(1)
Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CITY OF BOGUE, KANSAS
and CITY OF HILL CITY, KANSAS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

Whether after five years of litigation Petitioners are denied Eleventh Amendment Sovereign Immunity and Fifth Amendment Due Process and Equal Protection by dismissal on mootness grounds of their constitutional claims challenging 47 U.S.C. § 253 and FCC rules which compel Petitioners, as arms of a state, to appear before the FCC to defend against suits filed by private parties, which require them to comply with federal orders directing them to take action in furtherance of Federal regulatory objectives, which determine that the FCC may regulate local governmental decisions "whether or not such legal requirements affect interstate telecommunications services," and which determine that the FCC has authority to conduct enforcement proceedings against them even though they do not hold FCC authorizations, where the dismissal is predicated on the FCC's post-appeal vacatur of the challenged orders, but where Petitioners nevertheless remain bound to comply with § 253.

II. LIST OF PARTIES TO THE PROCEEDING

1. Petitioner, The City of Bogue, Kansas, is a municipality located in Kansas. There are no parent or affiliated companies.

2. Petitioner, The City of Hill City, Kansas, is a municipality located in Kansas. There are no parent or affiliated companies.

3. Respondents, Federal Communications Commission and the United States of America.

4. Intervenors below: Classic Telephone, Inc., AT&T Corp., Association for Local Telecommunications Services, National Cable Television Association, Inc., US WEST, Inc., Teleport Communications Group, Inc., Telecommunications Resellers Association, MCI Telecommunications Corporation.

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[1] All citations to statutes and regulations are to the current version unless noted otherwise.

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2. *Classic Telephone, Inc.*, 12 FCC Rcd. 15619 (FCC 1997) (*Enforcement Order*), *proceeding terminated, Classic Telephone, Inc.*, 14 FCC Rcd. 960 (Policy and Program Planning Div. 1999) (*Enforcement Termination Order*); *recon. denied, Classic Telephone, Inc.*, 14 FCC Rcd. 19974 (FCC 1999) (*Enforcement Reconsideration Order*), *appeal dismissed, City of Bogue, Kansas and City of Hill City, Kansas v. FCC and United States of America*, Nos. 96-1432, 99-1521, *Order*, released March 15, 2001 (D.C. Cir.) (unpublished) (*Dismissal Order*), *r'hrng denied, City of Bogue, Kansas and City of Hill City, Kansas v. FCC and United States of America*, Nos. 96-1432, 99-1521, *Order*, released June 29, 2001 (D.C. Cir.) (unpublished) (*Rehearing Denial Order*).

3. *Classic Telephone, Inc.*, 15 FCC Rcd. 25101 (FCC 2000) (*Vacatur Order*), pet. for recon. pending.

VI. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the District of Columbia Circuit filed its *Dismissal Order* in this case on March 15, 2000.[1] On April 26, 2001, within 45 days as required by Circuit Rule 35(a), Petitioner timely filed a petition for *en banc* rehearing which was denied by the *Rehearing*

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[1] Reprinted Apdx. 1a.

Denial Order filed June 29, 2001.[2] Pursuant to Supreme Court Rules 13.1 and 13.3, the instant petition is timely filed within 90 days of the issuance of the June 29, 2001 *Rehearing Denial Order*.[3] The 90th calendar day after June 29, 2001 is Thursday, September 27, 2001. Subject matter jurisdiction arises under 5 U.S.C. § 702, 28 U.S.C. § 1254(1), and 47 U.S.C. § 402(j).

VII. CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS CITED[4]

U.S. Const. Amend. V; U.S. Const. Amend. XI; 5 U.S.C. § 702 Right of review; 28 U.S.C. § 1254(1), Courts of appeals; certiorari; 28 U.S.C. § 2343, Venue; 28 U.S.C. § 2344, Review of Orders; Time; 47 U.S.C. § 253, Removal of Barriers to Entry; 47 U.S.C. § 402, Judicial review of Commission's orders and decisions; Kan. Stat. Ann. 12-2001, Franchises.

VIII. STATEMENT OF THE CASE

A. Statement of Facts

The Cities are municipalities located in the State of Kansas. Bogue has a population of less than 200 persons, Bogue's *Comments Opposing Petition*, at 1, and Hill City has a population of less than 2,000. Hill City's *Opposition to Petition for Preemption*, at 3. Bogue and Hill City are referred to herein as "The Cities" or "Petitioners."

The Kansas Corporation Commission (KCC) is authorized to issue certificates of convenience and necessity to telephone exchange companies. However, a certificate holder cannot provide service in a community until it receives a

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[2] Reprinted Apdx. 80a.

[3] For purposes of seeking *certiorari* the D.C. Circuit has determined that "a timely petition for rehearing or rehearing *en banc* extends the time for petitioning the United States Supreme Court for a writ of *certiorari*." Handbook of Practice and Internal Procedures, January 3, 2000, at 55.

[4] All citations to statutes and regulations are to the current version unless noted otherwise. Texts are provided in the Appendix

franchise from that community. The KCC's issuance of a certificate of convenience and necessity does not require a community to issue a local telephone exchange franchise to the certificate holder. *United Tel. Co. of Kansas v. City of Hill City*, 258 Kan. 208, 221, 899 P.2d 489 (Kan. 1995). The State of Kansas has ceded the power to issue telephone exchange franchises to The Cities and The Cities exercise the sovereign state police power to act upon telephone exchange franchise applications. Kan. Stat. Ann. 12-2001; Apdx. 86a; *Preemption Order* 11 FCC Rcd. at 13100-01 ¶ 34; Apdx. 30a-32a; Bogue's *Comments Opposing Petition*, at 2 n. 3; Bogue's *Reply Comments Opposing Preemption*, at 6. Only after a company receives both state and local approval may an entity provide critical lifeline telephone exchange service.

In 1993 The Cities terminated the telephone exchange franchises of Sprint-United Telephone Company for being inadequate. These decisions were ultimately affirmed by the Kansas Supreme Court as being reasonable exercises of franchising power. *United Tel. Co. of Kansas v. City of Hill City*, 258 Kan. 208, 223 899 P.2d 489 (Kan. 1995); *Preemption Order*, 11 FCC Rcd. 13084-85; ¶¶ 3-4; Apdx 4a-6a. In May 1995, while *United Tel. Co. of Kansas v. City of Hill City* was pending in the Kansas Supreme Court, Classic applied to The Cities for local telephone exchange franchises. *See* Classic's March 19, 1996 *Petition for Preemption*, at Exhibit 3 & Exhibit 5 (letters to The Cities' attorneys from Classic's counsel); Classic proposed to acquire and to operate the Sprint-United telephone facilities which had already been found inadequate and which The Cities had already determined would not continue to be franchised. Even after the Kansas Supreme Court determined that The Cities had the authority to terminate Sprint-United's exchange franchises, Classic continued to propose using those facilities while promising to improve the facilities. *See* Classic's *Petition for Preemption*, at Exhibit 6 (July 25, 1995 letter from Classic's attorney to Bogue's

attorney stating continued intent to acquire Sprint-United facilities).

§ 253 (b) does not, on its face, preempt local telephone exchange franchising authority. To the contrary, § 253(b) is a "plain statement" explicitly authorizes state franchising authority by providing that states should continue, *inter alia*, to "protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[5] Utilizing long held telephone franchising powers, The Cities denied telephone franchises to Classic for a variety of reasons, including Classic's proposal to acquire and to operate facilities which The Cities had already determined were "highly inadequate." *See* Bogue's *Comments Opposing Petition*, at 6-7; Hill City's *Opposition to Petition for Preemption*, at 1, 4, 19. The Cities reminded the FCC that "telephone exchange service is an essential communications link relied upon to reach fire, police, and emergency medical services." *See* Bogue's *Comments Opposing Petition*, at 9; Hill City's *Opposition to Petition for Preemption*, at 10. The Cities were also very concerned that Classic's failure to provide financial information prevented The Cities from determining whether Classic could be relied upon to be a provider of lifeline

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[5] In order to constitute a valid preemption of state authority a federal statute must contain a "plain statement" that Federal preemption is intended. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). Rather than containing a plain preemption statement, the "plain statement" contained in § 253(b) provides that states retain the authority "to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." The Cities' *Initial Brief*, Nos. 96-1432, 99-1521, at 33-34 & n. 22. It is important that there is no meaningful "opt out" option for states by which the Federal Government would assume the responsibility of issuing franchises in each of the thousands of communities across the country. The Cities' *Initial Brief*, Nos. 96-1432, 99-1521, at 39-40 citing *Petersburg Cellular Partnership*, 205 F.3d 688, 700 (4th Cir. 2000) (*per curium*) (Niemeyer, J. concurring).

services. *See* Bogue's *Comments Opposing Petition*, at 8-10; Hill City's *Opposition to Petition for Preemption*, at 11, 20.

The Cities subsequently denied Classic's February 14, 1996, requests for reconsideration which Classic had filed after passage of the Telecommunications Act of 1996. *Preemption Order*, at ¶ 8, Apdx. 9a-10a and Classic filed its March 1996 preemption petition with the FCC. On April 8, 1996 Classic filed a civil suit against The Cities seeking more than $80 million for alleged state and federal antitrust violations, attorneys' fees, and other perceived injuries. Classic's claims against The Cities were dismissed by the United States District Court for the District of Kansas in orders issued December 4, 1996 and January 22, 1998. Case No. 96-2166-DES.

B. The Preemption and Enforcement Decisions

Approximately five years ago Classic filed a case with the FCC against The Cities to determine whether The Cities' exercise of their police powers in denying local telephone exchange franchises to Classic Telephone, Inc. (Classic) should be preempted. In the complete absence of any rules or prior decisions, the FCC determined that The Cities' franchise denials violated 47 U.S.C. § 253 and the FCC ordered The Cities to reconsider their decisions consistent with the FCC's directions. *Preemption Order*, 11 FCC Rcd. at 13108 ¶ 50; Apdx. 42a-43a. The Cities disagreed with the Commission's factual determinations, but more importantly, The Cities disagreed with the Commission's determination that it had the constitutional authority to call them before it to defend themselves against a suit filed by a private party, to regulate their exercise of police powers, and to direct them to regulate interstate commerce in a prescribed manner. Consequently, The Cities filed No. 96-1432.

Despite the pendency of No. 96-1432, the FCC, at Classic's request, commenced an enforcement action against The Cities to determine whether The Cities had violated the Communications Act or the *Preemption Order*. *See* FCC's

December 13, 1996 *Public Notice*, 11 FCC Rcd. 22506 (1996) instituting a public enforcement proceeding to determine whether the FCC should

> (1) Enjoin the Cities from interfering with Classic's provision of telecommunications services; (2) Find that the Cities' inaction justifies the issuance of an order granting Classic a franchise and all other necessary authority for Classic to engage in the provision of intrastate telecommunications service within the Cities; (3) Impose sanctions on the Cities, including but not limited to attorneys fees and costs; (4) Notify the Cities of their apparently willful violation of Section 253 of the Communications Act and the Commission's Order in this proceeding and assess a forfeiture in an amount to be determined pursuant to Title V and the Commission's rules and regulations; (5) Direct the Cities to show cause why the Commission should not initiate further proceedings to assess additional forfeitures, in an amount to be determined, for each day that violations of the 1996 Act and the Commission's Order in this proceeding continue after the Commission's release of its Notice of Apparent Liability; and (6) Any other and all such relief as the Commission may deem appropriate.

Over The Cities objection, the Court permitted the FCC to proceed with the enforcement action, but the Court held Case No. 96-1432 in abeyance pending a final FCC order in the enforcement case. *See* January 14, 1997 *Order*, No. 96-1432. The enforcement proceeding lasted for nearly three years, through the issuance of the *Enforcement Order*. Some time after the FCC issued the *Enforcement Order* Classic advised the FCC that it no longer intended to provide local telephone exchange service in The Cities. Based upon Classic's statement of intent not to serve The Cities, the FCC thereafter dismissed The Cities' reconsideration of the enforcement

action. *Enforcement Termination Order*, 14 FCC Rcd. 960; Apdx. 73a; *Enforcement Reconsideration Order*, 14 FCC Rcd. 19974; Apdx. 75a. The Cities filed Case No. 99-1521 to seek review of the FCC's handling of the enforcement proceeding.

On September 27, 2000 The Cities filed their *Initial Brief*, in Nos. 96-1432, 99-1521. A few days later, on October 5, 2000, the FCC filed a *Motion to Defer Briefing Schedule* which argued that the FCC was considering vacating the challenged orders and that there was a "likely prospect that the Commission will adopt the staff's recommendation [to vacate the challenged orders] and thereby moot this case" *Motion to Defer Briefing Schedule*, at 1.[6] The Court granted the FCC's *Motion to Defer Briefing Schedule* over The Cities' opposition. The FCC subsequently vacated the challenged orders without seeking public comment. *Vacatur Order*, 15 FCC Rcd. 25101; Apdx. 78a. The Cities thereafter filed a petition for reconsideration of the *Vacatur Order* seeking exemption from the requirements of 47 U.S.C. § 253. On January 4, 2001 the FCC advised the D.C. Circuit that the FCC could not exempt The Cities from § 253. *See* FCC's January 4, 2001 *Reply to Petitioners' Response to Motion to Dismiss and FCC's Opposition to Petitioners' Motion to Defer Ruling*, at 2.

C. The Court of Appeals Decisions

This proceeding seeks review of the circuit court's dismissal of Petitioners' challenges to several FCC orders in a local telecommunications regulation preemption case and in a related enforcement case purportedly conducted pursuant to the

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[6] The FCC also advised the Court that "if the Commission adopts the staff's recommendation, this case will become moot. Given the likelihood that the Commission will soon take action that will render this case moot, we respectfully ask the Court to suspend briefing in this case pending FCC action on the staff's recommendation to vacate the *Preemption Order* and the *Order Denying Relief* [the *Enforcement Order*]." *Motion to Defer Briefing Schedule*, at 2.

Communications Act, as amended, 47 U.S.C. §151, *et seq.* Appellate review of the FCC's orders are authorized by the Communications Act, 47 U.S.C. §402(a), the Administrative Procedure Act, 5 U.S.C. § 702, and the Judicial Review Act of 1950, 28 U.S.C. § 2341 *et seq.* Venue was proper in the D.C. Circuit pursuant 28 U.S.C. § 2343.

The FCC's *Preemption Order*, 11 FCC Rcd. 13082 (1996) was released on October 1, 1996 and No. 96-1432 was timely filed on November 22, 1996, within the 60 day period required by 28 U.S.C. § 2344. The FCC's *Enforcement Reconsideration Order*, 14 FCC Rcd. 19974 (FCC 1999) was released on November 23, 1999 and No. 99-1521 was timely filed on December 13, 1999, within the 60 day period required by 28 U.S.C. § 2344. The *Enforcement Reconsideration Order* affirmed the staff's January 13, 1999 *Enforcement Termination Order*, 14 FCC Rcd. 960 (1999), which terminated the enforcement proceeding, but which left the *Enforcement Order*, 12 FCC Rcd. 15619 (1997) standing. While the circuit court required briefing on the issue of whether the *Enforcement Order* was properly before the court, *see Order*, released March 22, 2000; Petitioners' *Brief*, at 10-15, neither the *Dismissal Order* nor the *Rehearing Denial Order* rely upon this issue as supporting dismissal of 99-1521. Because that issue was not decided below, it is not argued instantly. In any event, the circuit court's jurisdictional concern expressed in its March 22, 2000 *Order* relates only to the *Enforcement Order* at issue No. 99-1521, the concern does not extend to No. 96-1432 and the *Preemption Order* which is at the heart of the constitutional challenges to § 253.

IX. ARGUMENT–Vacatur Cannot Cause Mootness

A. The Circuit Court's Sole Reliance Upon *United States v. Chrysler* is Misplaced

In dismissing the captioned action on mootness grounds the March 15, 2001 *Dismissal Order* relies solely upon *United States v Chrysler Corp.*, 158 F.3d 1530, 1353 (D.C. Cir. 1998)

(citing *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)); Apdx. 1a. The circuit court had previously ordered that the parties discuss various issues and Supreme Court cases concerning, *inter alia*, standing, mootness and ripeness in their briefs. *See Order*, March 22, 2000, No. 96-1432.[7] *United States v. Chrysler* was not one of the cases about which the Court specifically requested comment and the parties did not discuss that case in their pleadings and the circuit court's orders do not discuss any cases cited in The Cities' *Initial Brief*.

The circuit court's reliance upon *United States v Chrysler* is misplaced. First, *United States v Chrysler* was not dismissed on mootness grounds and the case proceeded to a merits decision. Thus, *United States v Chrysler* does not support dismissal of this case on mootness grounds.

Second, *United States v Chrysler* determines that "even the availability of a 'partial remedy' is sufficient to prevent [a] case from being moot." *United States v Chrysler*, 158 F.3d at 1534. One of the injuries discussed in *United States v Chrysler* which could be remedied by a decision on the merits was that future monetary penalties might be sought from the automobile manufacturer "for the alleged violations of the Act." *Id.* The panel's March 15, 2001 *Order* does not discuss The Cities' argument that unless the instant case were decided on the merits, and because the FCC had denied The Cities request to be exempted from the requirements of § 253 of the Communications Act, The Cities could be subject to significant monetary forfeitures. *See* The Cities' January 8, 2001 *Reply to FCC's Opposition to Motion to Defer Ruling*, at 3-4, where The Cities argued that denial of a request for statutory exemption provides standing, citing *Prayze FM v. FCC*, 214 F.3d 245, 251 (2nd Cir. 2000), and where The Cities argued that if there is the

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[7] The Cities discussed these cases as directed by the circuit court in their *Initial Brief*, at 10-23.

possibility of a substantial monetary forfeiture the party does "not have to wait until it is actually prosecuted to challenge the statute." *Sable Communications of California, Inc.*, 827 F.2d 640, 643-44 (9th Cir. 1987). Thus, not only does the circuit court's own decision in *United States v Chrysler* hold that the possibility of future monetary penalties prevents a case from becoming moot, the circuit court's dismissal of the captioned case conflicts with the going forward rulings of the 2nd and 9th circuits in the *Prayze FM* and *Sable Communications* cases.

Third, *United States v Chrysler* involves a commercial safety dispute with no constitutional implications while the instant case involves fundamental questions concerning the Federal government's authority, or rather the lack of it, to require states governments to appear before it to stand trial for the exercise of police powers, which powers the FCC concedes are not part of a part of interstate commerce, *Preemption Order*, 11 FCC Rcd. 13094 ¶ 23; Apdx. 21a., and to enact and administer a Federal regulatory program upon pain of loss of local police power, forfeiture, and other penalties. *See* FCC's December 13, 1996 *Public Notice*, 11 FCC Rcd. 22506 (1996) (commencing an enforcement proceeding against The Cities).

B. *City of Erie v. Pap's A.M., TDBA "Kandyland"* Controls The Mootness Question

1. Classic's Exit Does Not Moot The Cities' Claims

The case which must be considered in determining mootness in this case is *City of Erie v. Pap's A.M., TDBA "Kandyland,"* 529 U.S. 277 (2000). *See* The Cities' April 26, 2001 *Petition for Rehearing En Banc*, No. 96-1432, at 6-9; The Cities' January 8, 2001 *Reply to FCC's Opposition to Motion to Defer Ruling*, at 9-10; and The Cities' December 27, 2000 *Petition for Reconsideration* of the FCC's *Vacating Order*, at 4-5. In *City of Erie v. Pap's A.M., TDBA "Kandyland"* the local community had a regulation which prohibited public nudity. A local nude public dancing establishment, Kandyland, was successful in having the regulation declared unconstitu-

tional in the state court system. *City of Erie v. Pap's A.M., TDBA "Kandyland,"* 529 U.S. at 286. After the Supreme Court granted cert to review the state court decision, the owner of Kandyland filed a motion to dismiss on mootness grounds because Kandyland was no longer an operating business. The Supreme Court rejected the mootness argument and decided the case on the merits. The Supreme Court determined that

> simply closing Kandyland is not sufficient to render the case moot, however. Pap's is still incorporated under Pennsylvania law, and it could again decide to operate a nude dancing establishment in Erie. . . . The city has an ongoing injury because it is barred from enforcing the public nudity provisions of its ordinance. If the challenged ordinance is found constitutional, then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot.

City of Erie v. Pap's A.M., TDBA "Kandyland," 529 U.S. at 287.

The instant case is on all fours with *City of Erie v. Pap's A.M., TDBA "Kandyland."* Like the situation in *Erie* the instant case "is not a run of the mill voluntary cessation case." 529 U.S. at 288. Classic prevailed at the FCC in the instant, precedent setting, preemption proceeding and The Cities' franchising denial decisions were overturned by the FCC and the matter was sent back to The Cities for reconsideration and implementation of the Federal regulatory plan. *Preemption Order*, 11 FCC Rcd. at 13108 ¶ 50; Apdx. 42a-43a. Thereafter, after The Cities had filed No. 96-1432 with the D.C. Circuit, and after the FCC had issued its *Enforcement Order*, but while the enforcement proceeding was still pending at the FCC on reconsideration, Classic provided the FCC with a statement that it did not intend to provide telecommunications service to The

Cities.[8] The FCC accepted Classic's statement at face value and terminated the enforcement reconsideration proceeding in 1999 via the *Enforcement Termination Order*, 14 FCC Rcd. 960; Apdx. 74a-75a, over The Cities' objection. *See Enforcement Reconsideration Order*, 14 FCC Rcd. 19974; Apdx. 75a-76a.

After having used the instant case of first impression as a springboard, the FCC subsequently issued multiple preemption orders and it has otherwise interpreted § 253's legal requirements.[9] After establishing the § 253 regime, and only after nearly five years of litigation, and only after The Cities' filed their appellate brief in Nos. 96-1432, 99-1521, did the FCC vacate the challenged orders in late 2000. The purpose served by the *Vacatur Order*, as the FCC explained to the

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[8] It does not appear that Classic has withdrawn from Nos. 96-1432, 99-1521.

[9] For cases relying upon the instant case see, *see e.g.*, *Western Wireless Corporation, Memorandum Opinion and Order*, 15 FCC Rcd. 16227 ¶ 10 n. 27 (FCC 2000); *American Communications Services, Inc.; MCI Telecommunications Corp. Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act of 1934, as amended*, 14 FCC Rcd. 21579, 21587-88 ¶¶ 15, 16 n. 43 (FCC 1999); *AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated Sec. 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas*, 14 FCC Rcd. 11064, 11072-73 ¶ 18 n. 49 (FCC 1999); *TCI Cablevision of Oakland County, Inc., Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. Secs. 541, 544(e), and 253*, 12 FCC Rcd. 21396, 21438-39, 21441 ¶¶ 97, 103 & footnotes (FCC 1997); *New England Public Communications Council Petition for Preemption Pursuant to Section 253*, 11 FCC Rcd 19713, 19720-21 ¶ 17 n. 53 (FCC 1996); *see also RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1266 (10th Cir. 2000) (the court upheld the FCC's finding that the FCC can preempt a state regulation even if the case at the FCC has become moot).

circuit court in seeking to halt further briefing in Nos. 96-1432, 99-1521, was the "likely prospect that the Commission will adopt the staff's recommendation [to vacate the challenged orders] and thereby moot this case." FCC's October 5, 2000 *Motion to Defer Briefing Schedule*, at 1. The FCC further advised the circuit court that

> if the Commission adopts the staff's recommendation, this case will become moot. Given the likelihood that the Commission will soon take action that will render this case moot, we respectfully ask the Court to suspend briefing in this case pending FCC action on the staff's recommendation to vacate the *Preemption Order* and the *Order Denying Relief* [the *Enforcement Order*].

FCC's October 5, 2000 *Motion to Defer Briefing Schedule*, Nos. 96-1432, 99-1521, at 2.

Vacatur is a remedy applied to ensure that a party which is prevented from litigating due to extenuating circumstances is not bound by a non-appealable decision in the moot case. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Vacatur is not an administrative tool to be used to deny the opportunity to object to the FCC's regulatory program. It is clear that a party is not permitted to cause mootness such that the other party to the proceeding is prevented from litigating absent an "absolutely clear" showing that the problematic practice will not start up again. *See City of Erie v. Pap's A.M., TDBA "Kandyland,"* 529 U.S. 277 (2000); *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189 (2000) ("It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'"); *see also Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (party causing mootness has "heavy burden of persuading the court that the challenged

conduct cannot reasonably be expected to start up again" and the showing must be made with absolute clarity).[10]

This is not a case where the FCC sought to vacate the challenged orders after the case purportedly became moot. Indeed, the FCC's December 12, 2000 *Vacatur Order* was not even issued until after The Cities filed their *Initial Brief* in Nos. 96-1432, 99-1521 and not until nearly two years had elapsed from Classic's December 22, 1998, statement of non-intent to provide service. This is a case where the FCC seeks to make the case moot by vacating the challenged orders. While it may be axiomatic that if there is no case, the case is moot, the use of the vacatur power for the purpose of eliminating a case is a manipulation of Federal court jurisdiction which deprives The Cities of their right to attack the validity of § 253 as applied against them in a years long litigation.

The *Dismissal Order* finds the instant case moot in light of "Classic Telephone Company's decision not to provide telephone service to petitioners and the Federal Communications Commission's vacatur of the Preemption Order and Order Denying Relief . . ." *Dismissal Order*, at 1; Apdx. 1a. The *Dismissal Order* overlooks The Cities' argument that

> while Classic may have withdrawn its franchise applications, there is nothing which prevents it from resubmitting them to Petitioners at any time. Moreover, like the city in *City of Erie v. Pap's A.M., TDBA "Kandyland,"* Petitioners have an ongoing injury

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[10] The *Preemption Order*, 11 FCC Rcd. at 13108 ¶ 50, Apdx. 42a-43a, and the *Enforcement Order*, 12 FCC Rcd. at 15634-35 ¶ 30, Apdx. 68a, indicate that The Cities' future conduct will be monitored by the FCC with regard to the FCC's findings. Because the eventuality of future proceedings is certain enough for the FCC to warn The Cities, it cannot be "absolutely clear" that the circumstance could never arise again. *See* The Cities' *Initial Brief*, Nos. 96-1432, 99-1521, at 21-22. Moreover, as discussed below in Section IX.B.3., the objectionable practice has not even temporarily ended because The Cities are still required to comply with § 253.

> because § 253 prohibits Petitioners from utilizing their police powers to protect their citizens. *Id.* at 1390. At a minimum, the specter of § 253 regulation chills Petitioners' free exercise of their constitutionally protected police powers. *Cf. Charles v. Daley*, 749 F.2d 452, 460 (7th Cir. 1984 (chilling the exercise of a constitutional[ly] protected act is a cognizable injury)).

The Cities' January 8, 2001 *Reply to FCC's Opposition to Motion to Defer Ruling*, at 9-10; April 23, 2001 *Petition for Rehearing En Banc*, at 7-8. Because § 253 prevents The Cities from adopting a rule which prohibits service by unqualified service providers, and because The Cities must continue to comply with § 253, The Cities have a continuing interest in resolving the constitutional questions.[11]

2. Vacatur Does Absolve The Cities From Complying with § 253

The general rule is that a party is not permitted to temporarily alter questionable behavior to evade judicial review and voluntary cessation of a challenged practice rarely moots a federal case. *See City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 121 S.Ct. 743, 747 n. 1 (2001). Instantly, the *Vacatur Order* does not even temporarily remove the questionable behavior because The Cities remain bound to

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[11] The Cities argued to the FCC that they could not be compelled to issue franchises to Charles Manson or a mob family. *See* The Cities' *Initial Brief*, Nos. 96-1432, 99-1521, at 30-32. Who is qualified, and who is not qualified, to provide local service is a line drawing exercise. While the Federal government might choose to preempt completely, it has not done so here and § 253(b) explicitly authorizes the States to determine qualifications and the FCC cannot constitutionally order The Cities to use their franchise power to achieve a federally desire result. *See Printz v. United States*, 521 U.S. 898, 930 (1997); *New York v. United States*, 505 U.S. 144, 168-69, 178 (1992) (Federal Government may not rely upon state actors to bear political burdens and expense of implementing a Federal program). The Cities' *Initial Brief*, Nos. 96-1432, 99-1521, at 26.

comply with the requirements of § 253 as interpreted by the FCC. This is not a case in which a statute or regulation has been amended to remove the troublesome provision, *see e.g. Canfield v. City of Oklahoma*, 248 F.3d 1214, 1223 (10th Cir. 2001) (arguably overbroad language was deleted from statute during the pendency of the case and the case was thus rendered moot); *see also Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1310 (11th Cir. 2000), and the instant case does not concern whether a prior version of § 253 is constitutional. § 253 and the FCC's requirements under the statute remain unaltered by the *Vacatur Order* and Petitioners remain bound to obey them or risk further Federal litigation and penalties.

The FCC determined below, in a case of first impression under § 253, that it had the authority to hear a suit filed by a private party against arms of the state, to stand in judgment of them concerning their exercise of their police powers in the face of a standardless § 253, and to issue remedial orders against The Cities to require them to enact a Federal regulatory program. The circuit court's orders fail to discuss The Cities' concern that "even though the FCC has vacated the *Preemption Order* and the *Enforcement Order*, the statutory prohibition on Petitioners' reasonable exclusion of market entrants and the FCC's review of police decisions remains intact." *See* The Cities' April 26, 2001 *Petition for Rehearing En Banc*, at 8; The Cities' January 8, 2001 *Reply to FCC's Opposition to Motion to Defer Ruling*, at 6 citing *e.g. TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd. 21396, 21440-43 ¶¶ 102-110 (FCC 1997) (holding at ¶ 103 that FCC does not condone a "third tier" of telecommunications regulation citing, *inter alia*, "the Classic Telephone Decision" and that local regulation is limited to managing rights of way, while ¶ 106 states that the FCC is very concerned where localities determine new entrant service conditions); *see also The Missouri Municipal League*, 16 FCC Rcd. 1157 (FCC

2001) (FCC still conducting § 253 preemption proceedings); *RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1266 (10th Cir. 2000) (upholding the FCC's preemption in a case which had become moot); *Western Wireless Corporation, Memorandum Opinion and Order*, 15 FCC Rcd. 16227, 16233 ¶ 13 (FCC 2000) (preempting a Kansas universal service fund statute which had been replaced by the time the FCC issued the order).

The Cities remain bound to follow the requirements of § 253, and the FCC's interpretations of it, therefore the case is not moot notwithstanding the FCC's selectively applied vacatur remedy. *See* Section IX.C. below. By subjecting The Cities to suit and by ordering them to issue orders for the purpose of achieving Federal objectives, § 253 and the FCC failed to accord The Cities "the esteem due to them as joint participants in a federal system." *Alden v. Maine*, 527 U.S. at 758.

3. Injuries to The Cities

In deciding mootness questions, the possibility of future adverse consequences is a test for determining whether an issue is moot. *See City of Erie v. Pap's A.M., TDBA "Kandyland,"* 529 U.S. at 287-88 (case not moot because Kandyland's owner could reopen); *Prayze FM v. FCC*, 214 F.3d at 251 (2nd Cir. 2000) (denial of a request for statutory exemption provides standing);[12] *United States v Chrysler*, 158 F.3d at 1534; (case not moot because there was the possibility of forfeiture); *Sable Communications of California, Inc.*, 827 F.2d at 643-44 (case not moot because there was the possibility of forfeiture). The possibility of future adverse action does not have to crystalize into a certitude in order to save a case from mootness and instantly the FCC plainly acknowledges the possibility of future proceedings. *See* The Cities' April 26, 2001 *Petition for*

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[12] The Cities' interest in the requested denial implicates not only a concern about future consequences of having the statute applied against them, but also concerns a present denial of requested relief.

Rehearing, at 9 and the FCC's January 4, 2001 *Reply to Petitioner's Response to Motion to Dismiss and FCC's Opposition to Petitioners' Motion to Defer Ruling*, at 3 (the FCC advised the circuit court that if The Cities are ever placed in the position of having to defend themselves at the FCC again they can raise their arguments at that time, but in the meantime they will have to "'tailor their conduct' to comply with section 253 [when] they receive franchise applications from another entity seeking to provide competing local telephone service.").

Of course, the instant case does not concern only possible future injuries. Importantly, § 253 prevents, for example, The Cities from issuing franchising rules which would have the effect of excluding potential market entrants, such as on the grounds of felony convictions or a record of poor service elsewhere, because § 253 provides that "no State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service." (Emphasis added). Thus, even without considering the issue of future injuries, § 253 regulates The Cities' conduct today and "Petitioners have an ongoing injury because § 253 prohibits Petitioners from utilizing their police powers to protect their citizens." *See* The Cities' April 23, 2001 *Petition for Rehearing En Banc*, at 9-10; The Cities January 8, 2001 *Reply to FCC's Opposition to Motion to Defer Ruling*, at 10.

Moreover, The Cities' are entitled to vindicate their Eleventh Amendment Immunity Protection. It cannot be that The Cities must return to an improper Federal forum a second time at some point in the future, as the FCC suggests, in order to vindicate their constitutionally protected status. The Supreme Court has determined that "'it is not in the power of individuals to bring any State into court -- the State's or that of the United States -- except with its consent.'" *Alden v. Maine*, 527 U.S. at 746 citing *Great Northern Life Ins. Co. v. Read,*

322 U.S. at 59 (Frankfurter, J., dissenting); *see also Board of Trustees of the University of Alabama, et al., v. Garrett*, 531 U.S. 356, 121 S.Ct. 955 (2001) (11th Amendment protects states from suit by state employees for money damages brought under the Americans with Disabilities Act). The Cities are entitled to have decided in this case whether they compelled attendance at the FCC was constitutional.

The Cities are municipal corporations and, generally speaking, municipal corporations are not protected by the 11th Amendment. *Cf. Lincoln County v. Luning*, 133 U.S. 529 (1890). However, the State of Kansas has ceded The Cities the sovereign power to issue telephone exchange franchises. *Preemption Order*, 11 FCC Rcd. at 13101 ¶ 34; Apdx. 30a-32a; Kan. Stat. Ann. 12-2001; *United Tel. Co. of Kansas v. City of Hill City*, 258 Kan. 208, 221-223, 899 P.2d 489 (Kan. 1995) (local franchising decisions are binding upon the Kansas Corporation Commission). The Cities are entitled to 11th Amendment protection as "arms" of the state and private parties, such as Classic, may not sue them in cases filed at the FCC. *Alden v. Maine*, 527 U.S. at 756; *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401-03 (1979); *Jones v. Washington Metropolitan Area Transit Authority*, 205 F.3d 428, 432 (D.C. Cir. 2000) (local "performance of governmental functions" are covered by the immunity protection). Because § 253 authorizes the FCC to order states to regulate interstate commerce, an authorization which violates the principle of federalism, *New York v. United States*, 505 U.S. 144, 168-69, 178 (1992), and because Congress may not abrogate sovereign immunity through exercise of its commerce power, *Board of Trustees v. Garrett*, 531 U.S. 356, 121 S.Ct. at 962, § 253 is not a proper abrogation of state sovereign immunity. *See* The Cities' *Initial Brief*, Nos. 96-1432, 99-1521, at 27-32.

The Supreme Court has determined that "'a case is moot when the issues presented are no longer 'live' or the

parties lack a legally cognizable interest in the outcome'" and the federal courts have an "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review." *City of Erie v. Pap's A.M., TDBA "Kandyland,"* 529 U.S. at 278. The Cities certainly have a continuing interest in the Federal government's ability to block their exercise their police powers and to require them to enact a Federal program through § 253 and The Cities remain interested in preventing Federal suits brought against them by private parties in violation of the Eleventh Amendment.

C. The FCC's Selective Use of Vacatur

The circuit court's orders overlook The Cities' argument that

> parties before Federal courts may not avoid the consequences of their actions by deliberately acting to moot the case on appeal. *Northwest Pipeline Corporation v. FERC*, 863 F.2d 73, 79 n. 9 (D.C. Cir. 1988). Vacatur is a remedy applied when a case becomes moot; vacatur is not a litigation tool by which the Federal agencies may avoid judicial review while still binding the petitioning parties to the contested regulatory regime.

See The Cities' April 23, 2001 *Petition for Rehearing En Banc*, at 10, The Cities' January 8, 2001 *Reply to FCC's Opposition to Motion to Defer Ruling*, at 9. Not only is the FCC using vacatur as a tool to moot The Cities case, the FCC is selectively employing the vacatur remedy to reach that result.

While the FCC is not bound by Article III case and controversy rules, *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1161 (D.C. Cir. 1995), the FCC's selective application of the vacatur remedy instantly as a tool to defeat Petitioners' effort to obtain judicial review raises serious Fifth Amendment Due Process and Equal Protection

concerns through the FCC's use of vacatur.[13] The circuit court failed to discuss The Cities' argument that the FCC selectively employed the vacatur remedy in this case merely to obtain the dismissal of the instant action, while the FCC has not used the vacatur remedy in other "moot" cases. *See* The Cities' April 23, 2001 *Petition for Rehearing En Banc*, at 10; The Cities January 8, 2001 *Reply to FCC's Opposition to Motion to Defer Ruling*, at 8. The circuit court does not explain why it permitted the FCC's unreasoned departure from its policy of issuing § 253 preemption orders regardless of mootness. *See RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1266 (10th Cir. 2000) (the court upheld the FCC's finding that the FCC can preempt a state regulation even if the case at the FCC has become moot); *Western Wireless Corporation, Memorandum Opinion and Order*, 15 FCC Rcd. 16227, 16233 ¶ 13 (FCC 2000) (preempting a Kansas universal service fund statute which had been replaced by the time the FCC issued the order); *TCI Cablevision of Oakland County, Inc.* is yet another case in which the FCC issues legal determinations regarding § 253 even though § 253 is not pertinent to the resolution of that case. *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd. 21396, 21399 ¶¶ 7-8.

The FCC's policy at this time seem to be to control state action by issuing § 253 pronouncements in cases which are moot for the purposes of obtaining judicial review, but which are nevertheless binding upon The Cities and other State actors. Indeed, the FCC was happy to have the same thing happen to the instant case until, at least, it received service of The Cities' *Initial Brief* in Nos. 96-1432, 99-1521, which discussed, *inter alia*, the FCC's determination that § 253 allows the regulation

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[13] Instantly, the FCC did not even seek to vacate the challenged orders until years after they were issued and only after receiving service of Petitioners' September 27, 2000 *Initial Brief* which appears to have been the catalyst to the FCC's action.

of state and local governmental processes even if those processes do not affect interstate telecommunications services. *Preemption Order*, 11 FCC Rcd. 13094 ¶ 23; Apdx. 21a. Obviously, the FCC cannot issue orders to state and local governments to compel them to regulate in a prescribed manner, *see e.g.*, *Printz v. United States*, 521 U.S. 898, 930 (1997); *New York v. United States*, 505 U.S. 144, 168-69, 178 (1992), and just as obviously the Federal government cannot regulate purely local activities. *See Lopez v. United States*, 514 U.S. 549, 558-59 (1995) (Federal commerce authority is the power to regulate activities substantially affecting interstate commerce); *Alden v. Maine*, 527 U.S. 706, 739 (1999) (Federal power limited to those "'expressly given, or given by necessary implication'" citing *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816)).

X. CONCLUSION

The FCC succinctly stated in its December 19, 1996 *Emergency Motion for Expedited Review*, No 96-1432, at 2-3, that

> Petitioners' continuing failure to reconsider Classic's franchise applications has improperly impeded Classic from providing competitive telephone service in [The Cities]. . . . [A] swift and authoritative judicial ruling on the respective rights and obligations of the FCC, states, and municipalities under section 253 would help prevent any unnecessary conflict between the FCC and state and local officials in the future.

The need for an authoritative ruling regarding the FCC's authority to hear cases filed by private parties against states and to order states to enact and administer a federal regulatory program under threat of fines, loss of local governmental power, and other penalties is no less important today than it was five years ago. However, rather than seeking an authoritative ruling, the FCC has changed course to shield its

§ 253 rulings, including the decisions at issue instantly, from judicial review.

Given the FCC's decision to regulate § 253 by stealth, given the requirement that The Cities must enact a Federal regulatory program or face penalties for failing to do so, given the FCC's determinations that it may regulate local governments' franchising processes and intrude into that purely local matter, and given the FCC's determination that it can hear suits against states brought by private parties, this case is not moot and The Cities have an interest in receiving a ruling on the questions presented in their appellate case. The FCC's selective application of the vacatur remedy instantly merely to obtain dismissal on mootness grounds violates The Cities' due process and equal protection rights by denying them an opportunity to contest Federal requirements which cabin their police powers and which compel their attendance in a Federal forum to face suits where Eleventh Amendment sovereign immunity has not been waived.

Because Classic's decision to withdraw from the FCC proceeding and the FCC's *Vacatur Order* are voluntary actions, and because the *Vacatur Order* was entered for the express purpose of mooting this case, the case cannot be found to have become moot and The Cities respectfully request that the Court grant Certiorari.

Respectfully submitted,

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APPENDIX

1. *City of Bogue, Kansas and City of Hill City, Kansas v. FCC and United States of America*, Nos. 96-1432, 99-1521, *Order*, released March 15, 2001 (D.C. Cir.) (unpublished) (*Dismissal Order*).....1a

2. *Classic Telephone, Inc.*, 11 FCC Rcd. 13082 (FCC 1996) (*Preemption Order*).....3a

3. *Classic Telephone, Inc.*, 12 FCC Rcd. 15619 (FCC 1997) (*Enforcement Order*).....44a

4. *Classic Telephone, Inc.*, 14 FCC Rcd. 960 (Policy and Program Planning Div. 1999) (*Enforcement Termination Order*).....73a

5. *Classic Telephone, Inc.*, 14 FCC Rcd. 19974 (FCC 1999) (*Reconsideration Order*).....75a

6. *Classic Telephone, Inc.*, 15 FCC Rcd. 25101 (FCC 2000) (*Vacating Order*).....78a

7. *City of Bogue, Kansas and City of Hill City, Kansas v. FCC and United States of America*, Nos. 96-1432, 99-1521, *Order*, released June 29, 2001 (D.C. Cir.) (unpublished) (*Rehearing Denial Order*).....80a

8. Texts of Pertinent Statutes and Regulations.....81a

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

City of Bogue, Kansas and City of Hill City, Kansas, Petitioners v. Federal Communications Commission and United States of America, Respondents, National Cable Television Association, Inc., et al., Intervenors

No. 96-1432 Consolidated with 99-1521

Filed March 15, 2001

BEFORE: Williams, Randolph, and Garland, Circuit Judges.

ORDER

Upon consideration of the motion to dismiss, the response thereto, and the reply; and the motion to defer ruling, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. Classic Telephone Company's decision not to provide telephone service to petitioners and the Federal Communications Commission's vacatur of the Preemption Order and Order Denying Relief in *Classic Telephone Inc., Order*, FCC 00-432 (Rel. Dec. 12, 2000), mooted these petitions for review because they are intervening events that prevent the court from granting any effectual relief in favor of petitioners. *See United States v. Chrysler Corp.*, 332 U.S. App. D.C. 444, 158 F.3d 1350, 1353 (D.C. Cir. 1998) (citing *Calderon v. Moore*, 518 U.S. 149, 150, 135 L. Ed. 2d 453, 116 S. Ct. 2066 (1996) (quoting *Mills v. Green*, 159 U.S. 651, 653, 40 L. Ed. 293, 16 S. Ct. 132 (1895)). It is

FURTHER ORDERED that, in light of petitioners' representations, the motion to defer ruling be treated as withdrawn.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FEDERAL COMMUNICATIONS COMMISSION

In the Matter of Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief, CCB Pol 96-10, FCC 96-397

Released: October 1, 1996;
Adopted: September 30, 1996

MEMORANDUM OPINION AND ORDER

By the Commission

I. INTRODUCTION

1. On March 19, 1996, Classic Telephone, Inc. (Classic) filed the above-captioned Petition for Preemption, Declaratory Ruling and Injunctive Relief. Classic claims that two Kansas municipalities, Hill City and Bogue (the Cities), have blocked Classic's entry into the local markets in violation of Section 253 of the Communications Act of 1934,[1] added by the Telecommunications Act of 1996 (1996 Act).[2] Section 253(a) bars State and local governments from imposing legal requirements that may prohibit or have the effect of prohibiting the provision of telecommunications services. Accordingly, Classic requests that the Commission preempt the Cities' conduct, direct the Cities to issue telecommunications franchises to Classic, and enjoin the municipalities from further interfering with Classic's right to provide telecommunications services in those municipalities. For the reasons discussed

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[1] 47 U.S.C. § 253.

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at *47 U.S.C. § § 151* et seq. (1996 Act).

below, we grant Classic's request to the extent that we conclude that the Cities' decisions denying Classic's franchise applications are preempted under section 253, and deny Classic's petition in all other respects.

II. BACKGROUND

2. Classic is a wholly-owned subsidiary of Classic Communications, a holding company that controls various subsidiaries providing telecommunications services. On March 10, 1995, Classic entered into a purchase and sale agreement to acquire four telephone service exchanges in northwestern Kansas from United Telephone Company of Kansas (United).[3] One of these exchanges was the Hill City Exchange, which serves both Hill City and Bogue, Kansas (the Cities). Classic Cable, another subsidiary of Classic Communications, provides cable television services to the Cities as well as other communities in Kansas.[4]

3. United has been the certified incumbent provider of local exchange and exchange access telephone services in the Hill City Exchange, pursuant to a certificate of public convenience and necessity (CPCN) granted by the Kansas Corporation Commission (KCC).[5] Until 1993, United also held the local franchise authorizing it to operate a telephone business and system in Hill City.[6] Although United never held a local

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[3] Classic Petition at 3.

[4] See Classic Petition, Exhibit 12 at 2-3, Order and Certificate, United Tel. Co. of Kansas and Classic Tel., Inc., KCC Case No. 192-521-U (issued Dec. 8, 1995) (KCC Dec. 8th Order).

[5] Classic Petition at 3.

[6] *See* Hill City Comments, Exhibit 1, *United Tel. Co. of Kansas v. City of Hill City*, 258 Kan. 208, 213, 899 P.2d 489 (Kan. 1995) *(United Tel. Co. of*

(continued...)

franchise for Bogue, it provided telephone service to that city during the same period it provided service to Hill City.[7] In August 1993, Hill City terminated United's franchise effective December 31, 1993, on the ground it was dissatisfied with the quality of United's local telephone service.[8] Since terminating United's franchise, Hill City has permitted United to continue operating with an expired franchise to ensure continuation of telephone service to its residents.[9] Similarly, at Bogue's request, United continues to operate in Bogue without a franchise.[10]

4. In March 1994, United sought declaratory and injunctive relief in Kansas state court against Hill City regarding its refusal to renew United's telephone franchise.[11] On appeal from the state district court, the Supreme Court of Kansas held in United Tel. Co. of Kansas that, under Kansas law, a city may require a telephone company holding a CPCN from the KCC to obtain a local franchise in order to provide telecommunications services to residents of that city.[12] Kansas law permits local units of government to determine "which company or companies shall serve their communities so long as that decision does not interfere with intrastate and interstate

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[6](...continued)
Kansas). United had received a ten-year franchise from Hill City in 1974 that was automatically renewed through 1993. Id.

[7] See *United Tel. Co. of Kansas, 258 Kan. at 213.*

[8] Hill City Comments at 4-5.

[9] Classic Petition at 3.

[10] Classic Petition at 3 n.2. See para. 5, infra.

[11] *United Tel. Co. of Kansas*, 258 Kan. at 211.

[12] Id.

communications."[13] The Supreme Court of Kansas concluded that:

> While a telephone company with a certificate of convenience and necessity to serve an area may construct lines through a city, it may not serve that city without a franchise. While a city may grant a franchise to a telephone company, that company must obtain a certificate of convenience and necessity from the KCC. Finally, while the KCC may grant or deny certificates of convenience and necessity based on its powers to regulate the statewide telecommunications system, it may not force a city to grant a franchise to a telephone company.[14]

5. In May 1995, soon after having entered into the purchase and sale agreement for the Hill City Exchange from United, Classic applied for telephone franchises to serve Hill City and Bogue.[15] Each of the Cities denied Classic's application for a franchise to serve that city.[16] Each city had previously granted

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[13] *United Tel. Co. of Kansas*, 258 Kan. at 222 (citing KAN. STAT. ANN. 17-1901, 17-1902, 12-2001, and 66-131).

[14] *United Tel. Co. of Kansas*, 258 Kan. at 223. In the case before us, the Hill City Exchange serves both Hill City and Bogue. Although a telecommunications provider needs only one CPCN to serve the entire Hill City Exchange, under Kansas law the provider must obtain a franchise from each city in the exchange to serve those cities. Id.

[15] Classic Petition at 4-5; Classic Petition, Exhibits 3 and 5.

[16] Hill City denied Classic's franchise application pursuant to a written decision on September 20, 1995. It appears from the record that Bogue did not issue a formal written decision denying Classic's franchise application,

(continued...)

a franchise to another company, Rural Telephone Service Co. (Rural), to construct a telephone system and operate a telephone business within the Cities.[17] As noted above, however, the Cities allowed United to continue to provide service until Rural was operational.

6. In its September 1995 decision denying Classic's franchise request, Hill City noted that it did not "want to see two telephone companies in Hill City, competing side by side, in a situation that [would] be financially uneconomic for either company."[18] Hill City then stated its reasons for selecting Rural, rather than Classic, as Hill City's telephone franchisee: (i) Rural is a local company with a good reputation for telecommunications services, whereas Classic's corporate headquarters is in Texas, and Classic did not have a track record for furnishing telephone services; (ii) Rural's subscribers are its owners, whereas Classic's owners are unknown; and (iii) Rural has shown that it has the financial resources with which to build an advanced telecommunications network, whereas Classic has only claimed that it is financially secure without revealing its balance sheet.[19] Moreover, Hill City claimed that the KCC's "long standing policy of certificating only one telephone provider in each service territory may have a rational

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[16](...continued)
but apparently conveyed this information to Classic orally.

[17] See *United Tel. Co. of Kansas*, 258 Kan. at 214. Hill City granted Rural a franchise on March 7, 1994. It is unclear from the record exactly when Bogue granted Rural a franchise.

[18] Classic Petition, Exhibit 4, Letter from City of Hill City, Kansas to Classic Telephone, Inc. (September 20, 1995) denying telephone franchise (Hill City Initial Decision).

[19] Hill City Initial Decision at 3.

basis."[20] As for Bogue, it does not appear from the record before us that it issued a formal written decision explaining why it denied Classic's franchise petition.[21]

7. On December 8, 1995, the KCC approved the sale of United's Kansas exchanges (the Exchanges) to Classic, granted Classic a CPCN, authorized the transfer of the franchise, plant, property and equipment of United to Classic, and designated Classic as the carrier of last resort for the Hill City Exchange service area, which serves both the Cities.[22] In its decision, the KCC determined that Classic had "demonstrated it has sufficient managerial, technical, and financial capabilities to operate a telecommunications public utility in the described service territory;" that Classic is capitalized in an amount sufficient to assure the smooth operation of the Exchanges; that the close proximity of the Exchanges to various operations of Classic gives Classic the opportunity to consolidate services in the Exchanges; and that Classic will assume all responsibility to complete the modernization activity associated with the Exchanges by December 31, 1997.[23] The KCC also found that because Classic was purchasing the assets of United, the existing certificated incumbent local exchange carrier (LEC) for the Hill City Exchange, Classic would assume the obligation to be the provider of last resort for the entire Hill

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[20] Id. Kansas law prohibits the grant of exclusive franchises. KAN. STAT. ANN. 12-2001(b)(2)(3). The Cities argue in their comments, however, that by denying Classic's franchise applications, they were not granting Rural an exclusive franchise, but were simply denying the franchise of an applicant (Classic) that was not qualified to provide telecommunications services.

[21] On March 13, 1996, Bogue issued a Decision on Reconsideration of its denial of Classic's franchise application. See para. 11, infra.

[22] KCC Dec. 8th Order.

[23] KCC Dec. 8th Order at 3-4 and 11.

City Exchange.[24] Furthermore, in light of the Kansas Supreme Court's ruling in United Tel. Co. of Kansas, the KCC held that while the lack of a local franchise may actually prevent Classic from providing service within the city limits of Hill City and Bogue, the failure of the Cities to grant Classic permission to provide service does not affect Classic's willingness or managerial, technical, and financial capabilities to provide service within the Hill City Exchange.[25] The KCC also noted that, under Kansas law, a local franchise cannot be exclusive.[26] In a separate decision issued on December 8th, the KCC also granted Rural a CPCN to provide local exchange service in Kansas, but did not designate Rural as the carrier of last resort in the Hill City Exchange.[27]

8. The Cities immediately filed Petitions for Reconsideration of the KCC's December 8th Order granting Classic a CPCN and designating Classic as the carrier of last resort. Hill City requested that the KCC clarify whether its designation of Classic as the carrier of last resort was only until

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[24] KCC Dec. 8th Order at 11. Although the KCC does not define the term "provider of last resort," historically, the incumbent LEC is expected to provide service to all customers in the service area, whether or not it is economically beneficial to do so. In exchange for this obligation, the carrier is eligible for universal service funds. In the instant case, Classic is purchasing the system of the incumbent LEC, United. See Universal Service and the Information Superhighway: Perspectives from the Telecommunications Experience, 64 Fordham L. Rev. 782 (1995).

[25] KCC Dec. 8th Order at 13.

[26] *Id.* at 12-13 (citing KAN. STAT. ANN. 12-2001(b)(2)(3)).

[27] Classic Petition at n.9 (citing Rural Telephone Service Company, Inc., Order and Certificate, KCC Case No. 190-843-U (Dec. 8, 1995)). The record before us in this proceeding does not reflect the basis for the KCC's decision granting Rural a CPCN.

Rural's system was fully constructed, or if the designation was in perpetuity.[28] Bogue argued in its reconsideration petition that the KCC erred in granting Classic a CPCN and in designating Classic as the carrier of last resort because neither United nor Classic currently had an official franchise in Hill City or Bogue.[29] On January 11, 1996, the KCC affirmed and clarified its December 8th Order, stating that its decision to designate Classic as the carrier of last resort was reasonable based on the ability of Classic to provide "efficient and sufficient telephone service to the entire [Hill City] Exchange."[30] The KCC stated that at the time of its decision, no other telecommunications provider, including Rural, had a complete network to provide "necessary intrastate and interstate services to all subscribers within the exchange."[31] The KCC noted that its decision could be reconsidered at any time, and that when Rural completed its network, it could file a petition to reopen the docket to consider the issue of carrier of last resort designation. For similar reasons, the KCC also affirmed its decision to grant Classic a CPCN.[32]

9. On February 14, 1996, Classic formally requested Hill City and Bogue to reconsider their denials of Classic's franchise

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[28] Classic Petition, Exhibit 13, In re: United Telephone Co. of Kansas and Classic Tel., Inc., Order on Reconsideration, KCC Case No. 192-521-U, 95-CLST-508-COC (Jan. 11, 1996) (KCC Order on Recon.).

[29] KCC Order on Recon. at 3.

[30] Id. at 5.

[31] Id.

[32] Id.

applications in light of the enactment of the 1996 Act.[33] Classic stated in its requests for reconsideration that section 253 and other provisions of the 1996 Act dealing with telephony favor competitive, not monopoly, provision of such services.[34] Classic asserted that, pursuant to section 253, the Cities "must grant competitive franchises when requested," and it notified the Cities that if they did not act on Classic's renewed franchise requests, it would pursue all available remedies for noncompliance under the 1996 Act.[35]

10. Both cities rejected the renewed requests. Hill City stated in its denial that it would not grant Classic a franchise for the reasons set forth in its September 20, 1995 denial, and further, that it did not agree with Classic's "broad" interpretation of the 1996 Act.[36] Hill City also asserted that it was inappropriate to grant Classic a franchise for two additional reasons: (i) because the U.S. District Court for the District of Kansas had yet to issue a decision on the Cities' petitions, filed on February 9, 1996, requesting review of the KCC's December 8th and January 11th orders; and (ii) the FCC had not approved the transfer of FCC licenses from United to Classic, or ruled on Classic's price cap waiver requests.[37]

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[33] Classic Petition, Exhibit 9, Hill City Decision on Recon.; Classic Petition, Exhibit 10, Bogue Decision on Recon.

[34] Classic Petition, Exhibit 7, Classic Request for Reconsideration of Hill City's Decision.

[35] Id.; Classic Petition, Exhibit 8, Classic Request for Reconsideration of Bogue's Decision.

[36] Hill City Decision on Recon.

[37] Id. On November 8, 1995, Classic, in concurrence with United, filed an application with this Commission pursuant to section 214 of the

(continued...)

11. Bogue denied Classic's request for reconsideration on the grounds that: (i) Classic did not show that it would provide a telephone system equal in quality to the system that Rural was constructing, which Bogue interpreted to mean that Classic would retain the existing "obsolete" system, whereas Rural was already constructing an entirely "new, modern, all buried, one party system;" (ii) Classic failed to provide Bogue sufficient financial information that demonstrated Classic possessed the resources necessary to furnish telephone service; and (iii) Classic did not show that service by two telephone exchange

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[37](...continued)
Communications Act of 1934, as amended, *47 U.S.C. § 214,* and Part 63 of the Commission's rules, 47 C.F.R. Part 63, seeking Commission authority to acquire control of United's facilities located in several Kansas telephone exchanges, including the Hill City Exchange. On June 5, 1996, the Common Carrier Bureau granted Classic's application, finding that the transfer of control would serve the present or future public convenience and necessity. Classic Tel., Inc., Order and Certificate, DA 96-895, File No. W-P-C-7127 (Com. Car. Bur., rel. June 5, 1996). Also on November 8th, Classic and United filed a petition for waiver of two Commission rules. First, United and Classic requested a waiver of the definition of "Study Area" contained in Part 36 Appendix-Glossary of the Commission's rules, which effectively freezes all study area boundaries, as of November 15, 1984. In addition, Classic requested a waiver of Commission rule section 61.41(c)(2), which requires non-price cap companies, and the telephone companies with which they are affiliated, to become subject to price cap regulation after acquiring a price cap company or any part thereof. The Cities filed comments in opposition to Classic's waiver petition. On June 3, 1996, the Common Carrier Bureau granted the requested waivers, finding that the public interest would be served by allowing United to alter its study area boundary, and allowing Classic to establish a new Kansas study area operating under rate-of-return regulation. The Bureau also determined that the objections of Bogue and Hill City had been adequately addressed by the KCC and did not warrant denial of the petition. Classic Tel., Inc. and United Tel. Co. of Kansas, Memorandum Opinion and Order, FCC File No. AAD 95-171, DA 96-885 (Com. Car. Bur., rel. June 3, 1996) (Classic Study Area Waiver).

carriers was an economical and efficient use of Bogue's rights-of-way.[38]

12. Based on the Cities denials of Classic's requests for reconsideration, on March 19, 1996, Classic filed the above-captioned petition for preemption, declaratory ruling, and injunctive relief. On March 26, 1996, the Common Carrier Bureau issued a public notice establishing the pleading cycle for comments on Classic's petition. Eleven parties filed comments, oppositions, or replies regarding Classic's petition.[39] In addition, Classic filed several notifications of permitted ex parte presentations before the Commission.[40]

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[38] Classic Petition, Exhibit 10, Bogue Decision on Recon.

[39] Parties filing pleadings in the instant proceeding include: Association for Local Telecommunications Service (ALTS), AT&T Corp. (AT&T), the Cable Telecommunications Association, Inc. (CATA), MCI Telecommunications Corporation (MCI), Sprint Corporation (Sprint), Texas Cable & Telecommunications Association (TC&TA), Telecommunications Resellers Association (TRA), and National Cable Television Association, Inc., the city of Hill City, Kansas (Hill City), the city of Bogue, Kansas (Bogue), and the National Telephone Cooperative Association.

[40] April 22, 1996 (regarding ex parte meeting between Vice-President of Classic Telephone, Inc, counsel for Classic, Chief of the Program Policy and Planning Division of the Common Carrier Bureau, and Commission staff); June 7, 1996 (regarding letter from Rural referencing Classic's Opposition to Petition for Waiver in File No. AAD 96-38); June 10, 1996 (regarding ex parte meetings between Chairman and CEO of Classic Communications, Inc., counsel for Classic, and the Legal Advisors to Chairman Reed Hundt, Commissioner James Quello, Commissioner Rachelle Chong, and Commissioner Susan Ness); July 22, 1996 (alleging efforts by Hill City to prevent Classic Telephone and its affiliates, Classic Communications and Classic Cable, from providing telecommunications and cable service in Hill City); August 15, 1996 (regarding ex parte communications between counsel for Classic and Commission staff); August 15, 1996 (regarding ex parte communications between counsel for

(continued...)

III. DISCUSSION

13. The issue before us in this proceeding is whether section 253 preempts the Cities' decisions denying Classic's franchise requests.[41]

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[40](...continued)
Classic and Legal Advisor to Chairman Reed Hundt).

[41] Section 253, in relevant part, provides:

SEC. 253. REMOVAL OF BARRIERS TO ENTRY.
(a) IN GENERAL.--No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) STATE REGULATORY AUTHORITY.--Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) STATE AND LOCAL GOVERNMENT AUTHORITY.--Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) PREEMPTION.--If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency. *47 U.S.C. § 253.*

A. Ripeness and Other Procedural Issues

14. Bogue contends that we need not reach the merits of Classic's petition because it is premature. Specifically, Bogue asserts that we are required by section 257 of the Communications Act to complete a rulemaking to determine what constitutes a barrier to entry before we may rule on the merits of any petition that seeks to invoke our preemption authority under section 253.[42] Classic disputes Bogue's contentions on the grounds that section 253 "authorizes the Commission to preempt any law or regulation" that violates the section's prohibition against State and local entry barriers.[43] According to Classic, the Commission is required, pursuant to this section, to issue a public notice and provide an opportunity for public comment before reaching a decision on a petition that seeks to invoke its authority under section 253, but is not required to conduct a rulemaking.[44] Moreover, Classic contends that the delay that would result if the Commission were to defer action on this petition pending the adoption of rules pursuant to section 257 would put Classic at a competitive disadvantage in providing service in the Cities.[45]

15. We find that Classic's petition is not premature and is properly before us. We reject Bogue's assertion that section 257 of the Communications Act requires us to complete a

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[42] Bogue Comments at 4-5; Bogue Reply Comments at 8. See also ALTS Comments at 2-3 (requesting that the Commission establish guidelines as to what types of actions the Commission would view as violative of section 253).

[43] Classic Reply Comments at 13.

[44] Classic Reply Comments at 14.

[45] Classic Reply Comments at 15.

rulemaking prior to considering the merits of a petition filed under section 253. Section 257 requires the Commission to establish regulations "for the purpose of identifying and eliminating . . . market entry barriers for entrepreneurs and other small business."[46] We find that our authority under section 257 to identify and eliminate "market entry barriers" complements our authority under section 253 more broadly to preempt legal requirements that "may prohibit or have the effect of prohibiting" the provision of telecommunications services. There is nothing in the language of section 257 or its legislative history even remotely suggesting that it requires a rulemaking proceeding to implement section 253. We determine that the Commission's rulemaking responsibility under section 257 does not affect the issues raised in this proceeding.

16. Moreover, section 253 itself does not require the Commission to conduct a rulemaking prior to considering requests for preemption under section 253 and in fact, requires a different procedure. Rather, section 253(d) directs the Commission to rule on a petitioner's preemption request after public notice and an opportunity for comment on a particular State or local requirement.[47] While the Commission certainly could adopt rules to implement section 253,[48] it need not do so. Where Congress required the Commission to conduct a rulemaking proceeding prior to implementing a particular provision of the 1996 Act, the statutory provision makes that

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[46] *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Notice of Inquiry,* GN Docket No. 96-113, 11 FCC Rcd. 6280 (Section 257 NOI) (1996).

[47] *See* 47 U.S.C. § 253(d).

[48] *See*, e.g., 47 U.S.C. §§ 154(i), 201(b), 303(r).

requirement explicit.[49] Section 253 contains no such implementation requirements.

B. Section 253(a)

17. Classic claims that the Cities have awarded "de facto" exclusive franchises to Rural for the provision of telecommunications services within Hill City and Bogue.[50] Classic contends that the Cities' decisions to deny Classic's franchise application were based on allegedly invalid concerns regarding the economic effects of having two competing telephone companies.[51] Classic maintains, therefore, that the Cities' decisions violate section 253(a) which states that "no State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[52] Classic argues that the Commission must exercise its explicit preemption authority under section 253 to prevent local governments, such as the Cities, from frustrating the pro-competitive, de-regulatory

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[49] *See*, e.g., 47 U.S.C. § 251(d) (requiring the Commission "to establish regulations to implement the requirements of this section").

[50] Classic Petition at 2.

[51] *See* Hill City Initial Decision.

[52] 47 U.S.C. § 253(a). Additionally, Classic notes that the Cities' actions violate Kansas law which prohibits municipalities from granting an exclusive telephone franchise. KAN. STAT. ANN. § 12.2001(b)(3). See Classic Reply Comments at 6 (citing *United Tel. Co. of Kansas, 258 Kan. at 222)* (recognizing that the express intent of the Kansas Franchise Act was to vest cities with the power to grant franchises, but only to the extent that such cities' "decision does not interfere with intrastate and interstate communications")); see also National Telephone Cooperative Association Reply Comments at 2.

purpose of the 1996 Act, and to remove decisions concerning the provision of telecommunications services "from the vicissitudes of local politics and arbitrary regulatory restraints."[53]

18. The supporting commenters generally argue that by not granting a franchise to Classic, the Cities are prohibiting Classic from providing telecommunications services in violation of section 253, and that pursuant to this statute, the Commission must preempt the actions of the Cities. These commenters argue that the legislative history of section 253 demonstrates that Congress intended this section to remove all barriers to entry in the provision of telecommunications services.[54]

19. The Cities maintain that their franchise denials do not prohibit the provision of telecommunications services, and therefore, the decisions do not violate section 253(a). Specifically, Bogue contends that the Cities' actions are permitted because the real intent of the 1996 Act is to protect competition, not individual competitors such as Classic.[55] Bogue maintains that its denial of Classic's franchise request was not an explicit prohibition on entry, but the denial of a franchise to a single company because that company is

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[53] Classic Petition at 10-11.

[54] See ALTS Comments at 3-4 and CATA Comments at 6 (citing S. CONF. REP. NO. 230, 104th Cong., 2d Sess. 1, at 126 (1996) (Joint Explanatory Statement) (explaining the intent of the identical Senate provision that Congress ultimately adopted as the official language of section 253)); see also MCI Comments at 3; TRA Comments at 2.

[55] Bogue Comments at 12 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 344, 82 S.Ct. 1502 (1961)).

unqualified to provide service.[56] Similarly, Hill City asserts that it has "no desire or intention to limit qualified or trustworthy entities from providing telecommunication services within its boundaries," but that it is permitted to deny the request of an unqualified company for a franchise to operate a telephone system and business.[57]

20. Moreover, Bogue argues that section 253 does not give the Commission authority to preempt the purely local matter of franchising authority. Bogue maintains that Congress did not intend to alter the "dual regulatory system" set out in section 2(b) of the Communications Act, which provides that, with certain exceptions, nothing in the Act shall be construed to give the Commission jurisdiction with respect to "regulations for or in connection with intrastate communication service by wire or radio of any carrier . . ."[58] If Congress had intended to modify this jurisdictional limitation, Bogue contends that Congress would have explicitly granted the Commission authority to regulate local matters, including matters relating to franchise issues.[59] Bogue further argues that because there is no clear expression of preemption of franchising power in the 1996 Act, the Cities retain the authority, which existed prior to the 1996 Act, to deny franchises, and not just impose conditions on franchises.[60]

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[56] Bogue Reply Comments at 5-6.

[57] Hill City Comments at 3 and 8.

[58] 47 U.S.C. § 152(b).

[59] *See* Bogue Comments at 14.

[60] Bogue Comments at 11. See National Telephone Cooperative Association Reply Comments at 2.

21. Furthermore, the Cities argue that construing a locality's denial of a franchise application as a barrier to entry eliminates the ability of State or local governments to deny a franchise under any circumstances. Bogue contends, for example, that if the Commission interprets section 253 to remove from State and local governments all authority to deny franchises, State and local governments "would be required, without question, to issue a local telephone exchange franchise" regardless of the technical, financial, and other qualifications of an applicant.[61]

22. Classic replies that based on the unambiguous language of section 253, the Commission's preemption authority extends to all barriers to entry, including those erected by local authorities pursuant to their limited franchising power.[62] n62 In addition, Classic contends that section 2(b) of the Communications Act does not restrict the Commission's preemption authority over legal requirements that violate section 253 because section 253 makes clear that State or local barriers to entry affect competition in general and the harm to competition cannot be separated into interstate and intrastate components of our nation's telecommunications system.[63]

23. Scope of Section 253. Section 253(a) proscribes State or local statutes, regulations, or legal requirements that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications

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[61] Bogue Reply Comments at 3. Classic argues that section 253 permits local governments to "place necessary competitively neutral conditions on the operations of telecommunications providers, but withdraws from the localities the power to deny franchises." Classic Petition at 11.

[62] Classic Reply at 5.

[63] Classic Reply at 8.

services."[64] Section 253 preempts legal requirements that may prohibit or have the effect of prohibiting intrastate telecommunications services whether or not such legal requirements affect interstate telecommunications services. Contrary to Bogue's arguments, the plain language of section 253 does not exempt from the scope of federal preemption purely local matters of franchising authority. In addition, the legislative history confirms that Congress intended to preempt purely intrastate matters; section 253 does not exclude all franchising issues.[65]

24. Moreover, the standards for preemption established in Louisiana PSC do not foreclose preemption of State and local entry restrictions under section 253.[66] In Louisiana PSC the

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[64] 47 U.S.C. § 253(a) (emphasis added).

[65] The language of the identical Senate provision that Congress ultimately adopted as the official language of section 253 preempts barriers to entry in the provision of both interstate and intrastate telecommunications services. See, e.g., Joint Explanatory Statement at 126 and S. REP. NO. 23, 104th Cong., 1st Sess. at 35. As Senator Hollings observed, such preemption is necessary for "uniformity, understanding, [and] open competition in interstate telecommunications -- and intrastate . . . telecommunications." 141 Cong. Rec. S8174 (daily ed. June 12, 1995) (statement of Sen. Hollings).

[66] *Louisiana Pub. Serv. Comm'n*, 476 U.S. 355 (1986) (Louisiana PSC). Under Louisiana PSC, the Commission may preempt State regulation of intrastate service when it is not possible to separate the interstate and intrastate components of the asserted Commission regulation. *Louisiana PSC*, 476 U.S. at 375 n.4. In construing the "inseparability doctrine" recognized by the Supreme Court in Louisiana PSC, federal courts have held that where interstate services are jurisdictionally "mixed" with intrastate services and facilities otherwise regulated by the states, state regulation of the intrastate service that affects interstate service may be preempted where the State regulation thwarts or impedes a valid Federal policy. See *Illinois Bell Tel. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989);

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Supreme Court found that section 2(b) of the Communications Act prohibits the Commission from exercising federal jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services."[67] Thus, section 2(b) makes clear that, in the absence of a grant of authority to the Commission, State and local regulators retain jurisdiction over intrastate matters. But neither on its face nor as construed in Louisiana PSC does section 2(b) override express statutory preemption by Congress as found in section 253. Moreover, as we held in the Local Competition First Report and Order, where section 2(b) conflicts with a later and more direct provision of the Act, we will apply the latter provision despite section 2(b).[68] Thus, to the extent that section 2(b) would otherwise preclude preemption of certain State or local legal restrictions on the provision of intrastate telecommunications services, section 253 removes that limitation.

25. Section 253(a). We conclude that section 253(a),at the very least, proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality. Such legal requirements undeniably "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," as proscribed by section 253(a). The legislative history confirms this straight forward

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[66](...continued)
California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

[67] *Louisiana PSC*, 476 U.S. at 373 (quoting 47 U.S.C. § 152(b)).

[68] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Report and Order, FCC Docket No. 96-98, FCC 96-325 at P 93 (rel. August 8, 1996) (Local Competition First Report and Order).

interpretation of section 253(a).[69] Moreover, this reading of section 253(a) is consistent with the overriding goals of the 1996 Act. As explained in the Local Competition First Report and Order, under the 1996 Act, the opening of the local exchange and exchange access markets to competition "is intended to pave the way for enhanced competition in all telecommunications markets, by allowing all providers to enter all markets."[70] Section 253's focus on State and local requirements that may prohibit or have the effect of prohibiting any entity from providing any telecommunications services complements the obligations and responsibilities imposed on telecommunications carriers by the 1996 Act that are intended to "remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well."[71] n71 Congress intended primarily for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers, and by

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[69] For example, Senator Pressler, the Senate manager of the legislation, stated that some "States have granted . . . certain exclusive franchises, not allowing competition . . . and if we are having deregulation here, removal of barriers to entry, we have to take this step." 141 Cong. Rec. S8175 (daily ed. June 12, 1995) (statement of Sen. Pressler). "Section [253] goes to the very heart of this bill because removal of barriers to entry is what we are trying to accomplish." Id. See also, 141 Cong. Rec. S8174 (daily ed. June 12, 1995) (statement of Sen. Hollings) (stating that the intent of section 253 "is the removal of the barriers to entry").

[70] Local Competition First Report and Order at P 4 (emphasis added).

[71] Local Competition First Report and Order at P 3. Congress's intention to eliminate all economic and operational barriers to entry is reflected in newly enacted section 251, which requires incumbent local exchange carriers (LECs) to offer interconnection and network elements on an unbundled basis to requesting telecommunications carriers, and also provides for resale of LECs' retail services. *See* 47 U.S.C. § § 251(c)(2), 251(c)(3), and 251(c)(4).

preempting under section 253 sought to ensure that State and local governments implement the 1996 Act in a manner consistent with these goals.

26. We find that the evidence presented in this case supports Classic's contention that the manner in which the Cities implemented their franchise requirements, as reflected in their decisions denying Classic's franchise requests, prohibits Classic from providing interstate and intrastate telecommunications services in Bogue and Hill City, Kansas. Therefore, the decisions appear to violate section 253(a)'s proscription against prohibitions on the provision of telecommunications service by any entity, as well as the fundamental pro-competitive goal of the 1996 Act. For example, Hill City confirmed its intention to limit competition by permitting only one company, Rural, to provide telecommunications services, stating in its decision that Hill City does not "want to see two telephone companies . . . competing side by side, in a situation that will be financially uneconomic for either company,"[72] and that it may be a couple of years before true local service competition is present in Hill City.[73] Furthermore, as a basis for its denial, Hill City relied on the problems the community faced with United's provision of telecommunications services, rather than examining Classic's ability to provide quality telecommunications services. Additionally, Bogue explained that its decision to deny Classic's franchise request "is properly read as finding that

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[72] Classic Petition, Exhibit 4, Hill City Decision at 2.

[73] Hill City Decision at 2.

[Classic] has not demonstrated that two telephone exchange carriers could exist in the small city of Bogue."[74]

27. In their decisions, Hill City and Bogue both relied heavily on a comparison of the relative capabilities of Classic and Rural to provide local telephone service. The emphasis placed on the comparative capabilities of the two providers suggests that the Cities intended to choose only one entity as the telecommunications service provider for Bogue and Hill City, the result of which was to impose an absolute prohibition on Classic from providing telecommunications services. This absolute prohibition on Classic's competitive entry is precisely the type of action Congress intended to proscribe under section 253(a), absent a demonstration that the franchise denials are an exercise of authority specifically reserved to State and local governments under sections 253(b) or 253(c). As stated previously, based on the reasoning used by the Cities in their decisions denying Classic's franchise requests, the Cities' application of their franchising requirements to Classic prevents Classic from providing telecommunications services, and therefore, on its face, appears to violate section 253(a). In their pleadings in this proceeding, the Cities seek to justify their actions under sections 253(b) and 253(c). We address those claims below.

28. The Cities argue that a finding that the denials of Classic's franchise applications violate section 253(a) has the untenable result of eliminating the authority of States or localities to make franchising decisions. We reject this contention. We do not believe that Congress intended to remove franchising authority from State and local governments. Nothing in the language of the 1996 Act or the legislative

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[74] Bogue Comments at 8 (quoting Bogue Decision on Recon.).

history reflects this intention.[75] In fact, as discussed below, sections 253(b) and 253(c) recognize the authority of States and localities (including the Cities) to impose franchise requirements for certain purposes, and as such, these sections preserve the authority of States and localities to deny a franchise application until such time the applicant complies with these permitted legal requirements. We find here only that, on this record, the Cities' exercise of their franchising authority to prevent Classic from providing service appears, without further examination, to be prohibited by section 253(a).

C. Sections 253(b) and 253(c)

29. Although the Cities did not specifically offer these reasons in their decisions denying Classic's franchise applications, the Cities now claim in their submissions in this proceeding that they denied Classic's franchise applications on consumer protection grounds, the need to protect the public safety and welfare, and in order to manage the public rights of way, pursuant to authority preserved under sections 253(b) and 253(c).[76] First, Bogue asserts that section 253(b) permits competitively neutral franchise denials,[77] and that "there is nothing in the Communications Act of 1934 that requires a franchising authority to authorize inadequate local exchange

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[75] In the Joint Explanatory Statement, Congress explained that States must retain the ability to "reasonably condition telecommunications activities" in order to safeguard the rights of consumers. Joint Explanatory Statement at 127.

[76] *See* Bogue Comments at 6; see also Hill City Comments at 17.

[77] Bogue Reply Comments at 5.

service."[78] Bogue claims that commenters fail to explain why the Cities' efforts to protect the local community through the Cities' franchising power should be preempted.[79] Bogue also maintains that the powers accorded to the States in section 253(b) extend to localities by delegation under Kansas law.[80] Furthermore, Hill City contends that its denial was consistent with section 253(b) because it was attempting to protect its citizens from a harmful telecommunications provider.[81] Hill City also maintains that section 253(c) "creates an express and reasonable exception to the general prohibition of new section 253(a)" against barriers to entry, permitting the city to refuse to allow inadequate or harmful telecommunications systems to dig up public areas for construction or modification.[82] Hill City claims, and the National Telephone Cooperative Association agrees, that section 253(c) permits the Cities to exercise police power over public rights-of-way to preclude unqualified and/or untrustworthy entities from providing inadequate or unlawful

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[78] Bogue Comments at 7. Bogue believes that Classic's use of the existing United system is inadequate, and argues that permitting Classic to operate the "existing dilapidated system" while requiring Rural to construct a high cost, state of the art system would not be competitively neutral. Id. at 7-8. In addition, Bogue expresses concern regarding the ability of Classic to provide essential communications services in light of the poor financial ratings of Classic's affiliate, Classic Cable. Id. at 6-10.

[79] Bogue Reply Comments at 4.

[80] Bogue Comments at 2 n.3. As a result of the holding by the Supreme Court of Kansas in *United Tel. Co. of Kansas*, the Cities and the National Telephone Cooperative Association argue that the State of Kansas has delegated to Cities the authority Congress granted to the States in section 253(b). *United Tel. Co. of Kansas,* 258 Kan. at 220-225. *See* para. 4, supra.

[81] Hill City Comments at 17-18.

[82] *Id.* at 13.

telecommunications services.[83] The Cities contend that their decisions denying Classic's franchise applications are appropriate pursuant to sections 253(b) and 253(c), and that the Commission, therefore, must deny Classic's petition for preemption.

30. In this regard, Hill City also raises allegations of general misconduct against Classic. Hill City claims that Classic was "attempting to monopolize local cable and telephone service," would not be responsive to local service needs, was engaging in deceptive and illegal tying practices, and had developed a "highly antagonistic relationship" with the Cities.[84]

31. Classic replies that the Cities' decisions were not based on concerns about consumer protection, quality of service, or management of the public rights-of-way, pursuant to sections 253(b) or 253(c), and that the Cities' arguments are based on an unjustifiable expansive reading of the limited powers given to States and localities under those sections.[85] Classic argues that the Cities may not invoke the rights specifically reserved to the States under section 253(b). Classic contends, moreover, that even assuming local governments, by delegation, have authority to impose requirements under section 253(b), nothing in this section permits the Cities to impose preconditions on Classic in such a way as to prohibit entry.[86] Commenters note that the Cities' legitimate service quality concerns should be addressed by some means other than denying a franchise --

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[83] *Id.* at 3; National Telephone Cooperative Association Reply Comments at 2.

[84] Hill City Comments at 17-18.

[85] Classic Reply Comments at 7.

[86] *See* Classic Reply at 3.

such as the introduction of the very competition the Cities seek to prohibit.[87] Furthermore, commenters argue that management of the public rights-of-way under section 253(c) does not include denial of entry or interference with the provision of interstate or intrastate telecommunications services. Classic and commenters also assert that because Classic is purchasing the assets of the incumbent provider whose facilities already occupy the rights-of-way that the Cities' claim would be overburdened, the Cities' denials of Classic's franchise requests also exceed the authority reserved to local governments in section 253(c).[88]

32. Classic disputes the Cities' allegations of misconduct and maintains that it has not engaged in deceptive marketing practices, has been found by the KCC to be fully qualified to provide telephone service in the Cities, and has fulfilled all of its obligations with respect to upgrading the existing United system, as ordered by the KCC.[89] Furthermore, Classic argues that, even assuming that the allegations of misconduct were well founded, it does not change the fact that the Cities unlawfully prohibited Classic from providing telecommunications services.

33. Classic Motion to Strike Hill City Comments. Classic urges the Commission to strike the majority of the Hill City comments in this proceeding on the basis that the allegations of misconduct "run afoul of the Commission's recent reaffirmation

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[87] AT&T Comments at 3 n.4.

[88] *See* CATA Comments at 3-4; TC&TA Comments at 5; AT&T Reply Comments at 3-4; MCI Reply Comments at 5; National Cable Television Association Reply Comments at 3.

[89] Classic Reply Comments at 17-25.

of its commitment to eliminate frivolous pleadings."[90] We deny Classic's request to strike without reaching the issue of whether Hill City's allegations have merit. As discussed, infra, to the extent that Hill City shows that the alleged misconduct was an appropriate basis for denial pursuant to section 253(b) or 253(c), the allegations of misconduct are relevant to a determination of whether Hill City's denial of Classic's franchise application is preempted under section 253. We note that Classic's record as a cable operator, its promises to upgrade the existing system, and its marketing practices are all actions the Cities may legitimately regulate by requiring Classic, Rural, and all other qualified entities to abide by the same competitively neutral requirements consistent with sections 253(b) and 253(c), or by taking legitimate enforcement actions against Classic to address any violation of State laws. Moreover, as intended by Congress, the introduction of competition in the Cities should create an incentive for Classic, Rural, and other potential carriers to provide high quality systems and services at competitive rates. Accordingly, we will not strike these arguments as frivolous.

34. Authority of Localities Pursuant to Section 253(b). As an initial matter, we must determine whether section 253(b) applies only to States, as argued by Classic and other commenters,[91] or also to their political subdivisions. Unlike section 253(c), which refers to both State and local government authority, section 253(b) refers only to the authority of States. It appears from the titles of the subsections and the history of this provision that Congress deliberately separated the

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[90] Id. at 17 & n.10 (citing *Commission Taking Tough Measures Against Frivolous Pleadings, FCC Public Notice No.* FCC 96-42, 11 FCC Rcd. 3030 (Feb. 9, 1996)).

[91] *See*, e.g., Classic Reply Comments at 10.

functions included under section 253(b) and 253(c). Previous versions of subsection (b) gave similar regulatory authority to both State and local officials, but the text of the provision enacted limited to the States the authority of subsection (b).[92] Nonetheless, this statutory language does not necessarily preclude States from delegating their regulatory authority to local political subdivisions. The Supreme Court, in Wisconsin Public Intervenor v. Mortier,[93] found that a federal statute that plainly authorizes States to regulate, and is also plainly silent with reference to local governments, should not be construed as leaving localities with no regulatory authority, but only that the localities "could not claim the regulatory authority explicitly conferred upon the States that might otherwise have been preempted" by federal law.[94] The Court explained that "the principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion."[95] As with section 253(b), earlier versions of the statutory provision at issue in Mortier included both States and political subdivisions, but the provision as ultimately enacted referred only to the States. The Court in Mortier stated that while this change indicated "an unwillingness by Congress to grant political subdivisions regulatory authority, it does not demonstrate an intent to prevent the States from delegating such authority to its subdivisions, and still less does it show a desire to prohibit

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[92] H.R. REP. NO. 204, 104th Cong., 1st Sess. pt. 1 at 5 (1995).

[93] *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991) (*WPI v. Mortier*).

[94] *Id.*, 501 U.S. at 607.

[95] *Id., 501 U.S. at 607-608* (citations omitted).

local regulation altogether."[96] Accordingly, section 253(b) may be read to preserve certain regulatory powers of the States, and if there is a specific delegation by the State, local governments as well. Kansas law envisions a role for both the KCC and local units of government.[97] Thus, for purposes of this order, we will assume that the Cities may attempt to justify their actions pursuant to section 253(b).

35. Section 253(b). Section 253(b) preserves the authority of States to impose requirements to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers, provided that such requirements are necessary, competitively neutral, and consistent with the statute's universal service requirements, set forth in section 254 of the Communications Act, as amended.[98] Section 253(b), for example, ensures that States continue to have authority to require telecommunications service providers to make emergency services available to the public and comply with local consumer protection laws.

36. We conclude that the Cities have failed to provide sufficient evidence to show that their denials of Classic's franchise requests are permitted pursuant to section 253(b). Rather, as discussed, the reasons set forth by the Cities in their decisions denying Classic's franchise requests clearly indicate that the Cities simply did not want to authorize the entry of a competitive telecommunications provider.

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[96] *Id., 501 U.S. at 609.*

[97] *See* para. 4, supra.

[98] 47 U.S.C. § 253(b). *See* Joint Explanatory Statement at 127.

37. Furthermore, while the Cities have stated that their goals in denying Classic's franchise applications were to ensure the continued quality of telecommunications services, the Cities have not shown, or even attempted to show, that they applied their franchising requirements in a "competitively neutral" manner as required under section 253(b). In fact, based on the evidence before us in this proceeding, it appears the Cities in effect applied their franchise requirements to Classic in a manner that is not competitively neutral. At the very least, this mandate of competitive neutrality requires the Cities to treat similarly situated entities in the same manner. In this instance, the Cities denied Classic's franchise applications outright while granting the application of Rural, subject to certain conditions subsequent concerning service quality. We find no basis in the record of this proceeding that would justify such discrimination, which has the effect of foreclosing entry by one competitor while allowing another to enter.

38. Moreover, the Cities have not provided any evidence that their absolute denials of franchises to Classic were "necessary" to achieve the stated public interest goals as required by section 253(b). Congress envisioned that in the ordinary case, States and localities would enforce the public interest goals delineated in section 253(b) through means other than absolute prohibitions on entry,[99] such as clearly defined service quality requirements or legitimate enforcement actions. We find that the record in this proceeding does not support the Cities' claim that Classic is "unqualified" to provide local telephone service in the affected areas and that, therefore, the denials were necessary to protect the public interest goals set

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[99] In describing the identical Senate provision that Congress ultimately adopted as the official language of section 253(b), Congress stated that "States may not exercise this authority in a way that has the effect of imposing entry barriers." Joint Explanatory Statement at 126.

out in section 253(b). To the contrary, the record reveals that unlike the Cities' decisions, the KCC based its Dec. 8th decision to grant Classic a CPCN on a record of empirical evidence including, among other information, Classic's debt to asset ratio, projected income, and a stipulation regarding the gain on sale of the United system.[100] Relying on that comprehensive evidentiary record, the KCC found that Classic is capitalized in an amount sufficient to assure the smooth operation of the exchanges; that the close proximity of the exchanges to various operations of Classic gives Classic the opportunity to consolidate services in the exchanges; and that Classic will assume all responsibility to complete the modernization activity associated with the exchanges by Dec. 31, 1997.[101] These findings by the relevant state regulatory commission support the view that Classic is qualified to provide telecommunications services to the residents of the Hill City Exchange and belie the Cities' assertions to the contrary that their franchise denials are permitted pursuant to section 253(b) as necessary to "preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[102]

39. Section 253(c). Section 253(c) preserves the authority of State and local governments to manage the public rights-of-way, but requires such regulations to be both competitively neutral and nondiscriminatory. In addition, section 253(c) permits State and local governments to impose compensation requirements for the use of the public rights-of-way so long as such compensation is fair and reasonable, competitively

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[100] *See* KCC Dec. 8th Order at 3, 11, and Attachment A.

[101] *See* KCC Dec. 8th Order.

[102] 47 U.S.C. § 253(b).

neutral, nondiscriminatory, and is publicly disclosed.[103] The legislative history sheds light on permissible management functions under section 253(c). During the Senate floor debate on section 253(c), Senator Feinstein offered examples of the types of restrictions that Congress intended to permit under section 253(c), including State and local legal requirements that: (1) "regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts;" (2) "require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies;" (3) "require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation;" (4) "enforce local zoning regulations;" and (5) "require a company to indemnify the City against any claims of injury arising from the company's excavation."[104]

40. We find that the Cities have failed to show that their franchise denials reflect an exercise of public rights-of-way management authority or the imposition of compensation requirements for the use of such rights-of-way. The Cities' denials, therefore, do not trigger section 253(c). Instead, the Cities merely claim that section 253(c) permits their decisions, without providing any support for this contention. Based on the record before us, we conclude that the Cities have not

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[103] 47 U.S.C. § 253(c).

[104] 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from the Office of City Attorney, City and County of San Francisco). See also, Implementation of Section 302 of the Telecommunications Act of 1996, Second Report and Order, CS Docket No. 96-46, FCC 96-249, 61 Fed. Reg. 28698 at P 210 (1996) (describing additional examples of legitimate public rights-of-way management authority).

established an adequate premise to invoke the provisions of section 253(c).

41. Neither City relied on authority to manage public rights-of-way in its initial decision denying Classic's franchise request.[105] Although both of the Cities issued their reconsideration decisions after enactment of the 1996 Act, neither decision relied on the Cities' authority to manage public rights-of-way in affirming its earlier denial of a franchise to Classic. Specifically, in its decision on reconsideration Hill City simply reiterated that its denial of Classic's franchise request was based on the reasons set forth in its September 20, 1995 decision. Hill City's initial denial predated by more than four months passage of the 1996 Act and did not discuss issues relating to its management of the public rights-of-way or related compensation. Similarly, Bogue's decision on reconsideration did not refer to, or specifically rely on section 253(c), nor did it invoke concerns about management of rights-of-way or related compensation.[106]

42. Indeed, in its pleadings in this proceeding Bogue did not argue that its denial of Classic's franchise was an exercise of its authority to manage the public rights-of-way or related

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[105] Indeed, as noted previously, the record does not reflect that Bogue issued a written decision explaining why it denied Classic's franchise application initially. See para. 6, supra.

[106] Bogue based its denial on a comparative evaluation between Rural and Classic and on economic considerations of having multiple providers in a small community. In fact, Bogue's decision only mentioned rights-of-way in passing in the broader context of the economic considerations of multiple providers. Specifically, Bogue found that "Classic Telephone, Inc. cannot match the economy to subscribers of the service to be provided by Rural; and that the use of the city streets, alleys and public ways by two telephone companies to serve a City with the population of 191 persons of all ages, is not an economical or efficient use." Bogue Decision on Recon. at 1.

compensation requirements. Moreover, Hill City advanced its arguments based on management of rights-of-way and section 253(c) for the first time in conclusory fashion in its pleadings in this proceeding. In its comments in opposition to Classic's petition, Hill City claimed that, pursuant to section 253(c) it retained authority to deny Classic's franchise request because "police and franchise powers [preserved by section 253(c)] permit it to deny franchises to those who attempt to deceive its citizens, to monopolize critical telecommunications services and links, and to intimidate local governments and individuals."[107] Hill City asserted that, from the beginning, it was merely attempting "to obtain access to quality and reasonably priced telecommunications facilities and services for its residents and businesses."[108] These conclusory statements are inadequate to establish that the Cities actions reflect an exercise of public rights-of-way management authority or the imposition of compensation requirements for the use of such rights-of-way. Thus, upon evaluation of the record before us, we conclude that the denials did not involve the Cities' efforts "to manage the public rights-of-way" or to impose compensation requirements "for use of public rights-of-way," and therefore, do not trigger section 253(c).

D. Section 251(f)(1)(A)

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[107] Hill City Comments at 16. We note that Hill City relied on the same allegations in support of its claim that the franchise denial was permitted pursuant to section 253(b). Hill City stated that its actions were consistent with section 253(b) because "Hill City must protect the local public safety and welfare from any entity that appears to be attempting to monopolize local cable and telephone service, to be deceiving local residents . . . , to developing highly antagonistic relationships with many local governments, and to be willing to use lawsuits to intimidate potential opposition." Hill City Comments at 18.

[108] Hill City Comments at 15.

43. Bogue also contends that, although it has shown other valid reasons for denying Classic's franchise application, as a rural locality it is entitled pursuant to section 251(f) to deny Classic's franchise on economic grounds.[109] Bogue asserts that section 251(f) expressly prohibits local telecommunications exchange competition in rural areas, absent an affirmative finding by the appropriate State agency that such competition is not unduly economically burdensome.[110]

44. Classic replies that the Cities' reliance on section 251(f) to justify their denials of Classic's franchise applications is misplaced. First, Classic argues that section 251(f) permits States, not localities, to make a determination as to whether a

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[109] Bogue Comments at 15 n.20. Section 251(f) provides:

(f) RURAL MARKETS.--It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply-- "(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) that effectively prevents a competitor from meeting the requirements of section 214(e)(1); and "(2) to a provider of commercial mobile services. *47 U.S.C. § 251*(f).

[110] Bogue argues that because the State of Kansas regulates telephone exchange carriers at both the State level and through its various municipalities, section 251(f) must be read to include municipalities to the extent that a particular state may have delegated its franchising authority. Bogue Comments at 17-18 & n.24 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395 (1991)).

rural LEC shall be exempted from section 251(c) obligations.[111] In addition, Classic contends that the key distinction made between rural and non-rural markets under section 253 is in subsection 253(f) which declares that a State may require a telecommunications carrier in a rural area "to meet the requirements in section 214(e)(1) for designation as an eligible telecommunications carrier before being able to provide such service."[112] n112

45. Section 251(f)(1)(A) provides that the obligations imposed on incumbent LECs pursuant to section 251(c) "shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines . . . that such request is not unduly economically burdensome [and] is technically feasible . . ."[113] Section 251(f) permits the State commission, not the local government, to decide on a case-by-case basis whether a rural LEC has offered evidence that application of the Commission's section 251(c) requirements "would be likely to cause undue economic burdens beyond the economic burdens typically associated with efficient competitive entry."[114] Even assuming that the KCC has properly delegated its authority under section 251(f) to the Cities,[115] that section has no bearing on franchising decisions

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[111] Classic Reply at 11.

[112] 47 U.S.C. § 214(e)(1). Classic Reply Comments at 10.

[113] 47 U.S.C. § 251(f).

[114] 47 U.S.C. § 251 (f). *See* Local Competition First Report and Order at P 1262.

[115] The record does not reflect whether the KCC has delegated its authority under 251(f) to the Cities.

and opportunities for entry. Because the record does not reflect that the KCC (or even Bogue) has made such a decision, that Classic is a rural LEC, or that section 251(f) has bearing on these issues, section 251(f) does not appear to be applicable to the franchise issue before us.

E. Conclusion and Remedies

46. As stated previously, the Cities' decisions reflect the application of their franchise requirements in a manner that prohibits Classic from providing telecommunications services. The decisions, on their face, appear to violate section 253(a). Moreover, the Cities have failed to provide any evidence to show that their franchise denials are permitted pursuant to section 253(b). In addition, the Cities have not demonstrated that their actions were public rights-of-way management or related compensation actions so as to trigger section 253(c). We find, therefore, that section 253 preempts the Cities' decisions denying Classic's franchise applications for the provision of telecommunications services.

47. In its petition, Classic requests that the Commission: (1) declare that the Cities' denials of franchises to Classic have prohibited Classic from providing telecommunications services in violation of section 253(a); (2) declare that the Cities' denials are preempted pursuant to section 253(d); (3) declare that the Cities "must immediately grant to Classic all necessary franchise authorizations to offer telecommunications services within their corporate limits;" and (4) enjoin the Cities "from taking any action that has the purpose or effect of directly or indirectly interfering with Classic's provision of telecommunications services anywhere within Classic's service area."[116] Classic maintains that the Commission's authority encompasses more than the ability to preempt any legal

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[116] Classic Petition at 14-15.

requirements that violate section 253, but also extends to the power to strike the barrier and issue injunctions to effect the pro-competitive policies of section 253.[117] Classic contends that in addition to the explicit preemption authority pursuant to section 253, the Communications Act of 1934, as amended, empowers and requires the Commission to "execute and enforce the provisions of this Act,"[118] and that under this directive, the Commission has broad discretion to determine the appropriate tools to remedy any violation of the prohibition on barriers to entry articulated in section 253.[119]

48. Bogue contends that the Commission is prohibited from declaring that the Cities "must immediately grant to Classic all necessary franchises."[120] Bogue argues that the Tenth Amendment of the U.S. Constitution prohibits the Commission from issuing an order to a State or locality that requires the

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[117] Classic Ex Parte Presentation at 4 (June 10, 1996) (citing 47 U.S.C. § 154(i) and (j); *Southwestern Cable Co.*, 392 U.S. 157, 178, 88 S.Ct. 1994; *Policy Rules Concerning Rates for Dominant Carriers (Part I of II)*, 3 FCC Rcd. 3195, 3296-97 (1988); *In re Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements*, 6 FCC Rcd. 7511, 7513 (1991), *recon.*, 7 FCC Rcd. 4123 (1992); *Southern New England Telephone Company Expedited Petition for Emergency Interim Relief, Preliminary Injunction and* Stay, 10 FCC Rcd. 13194 (1995); *Applications of Craig O. McCaw and AT&T For Consent to Transfer Control of McCaw Cellular Communications and Its Subsidiaries*, 9 FCC Rcd. 5836, 5920 (1995)).

[118] 47 U.S.C. § 151.

[119] Classic Ex Parte Presentation at 1-3 (June 10, 1996).

[120] Bogue Comments at 19.

State to take action in furtherance of a federal regulatory objective.[121]

49. In the instant proceeding, section 253 preempts the Cities' decisions denying Classic's franchise applications. It appears from the record that the relevant Kansas franchising statute and regulations, which prohibit exclusive franchises, do not themselves prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services in violation of section 253. They do not create explicit barriers to entry and are facially competitively neutral. Section 253 does not, therefore, as suggested by some of the commenting parties,[122] preempt the applicable franchising statute or local regulations. Likewise, we do not find it necessary to examine the decision of the Supreme Court of Kansas in United Tel. Co. of Kansas, confirming that under Kansas law a telephone company holding a CPCN from the KCC must also obtain a franchise from the city the telephone company intends to serve.[123]

50. Section 253 preempts the Cities from enforcing their franchise requirements as reflected in the record in this proceeding -- with the effect of precluding Classic from providing local telecommunications services within the Cities. We expect the Cities to expeditiously reconsider Classics' franchise applications, i.e., within 60 days from the release of this order, in a manner consistent with this opinion. At this time, however, we decline Classic's request to "enjoin Hill City

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[121] Bogue Comments at 19 (citing *New York v. United States*, 505 U.S. 144 (1992)).

[122] MCI suggests that Congress deliberately separated the functions preserved under sections 253(b) and 253(c) to remove from local governments the authority to regulate entry. MCI Reply at 3-4.

[123] *See United Tel. Co. of Kansas*, 258 Kan. at 211.

and Bogue from taking any action that has the purpose or effect of directly or indirectly interfering with Classic's provision of telecommunications services anywhere within Classic's service area."[124] We do not believe such action is necessary at this time. We believe that, in this decision, we have provided the Cities sufficient guidance to implement their franchising requirements in a manner that does not prohibit the ability of any entity, including Classic, from providing telecommunications services and we expect they will do so. We note that, contrary to Bogue's arguments, the Tenth Amendment of the U.S. Constitution is not offended by federal preemption pursuant to section 253. Section 253 explicitly preempts State and local legal requirements. In this situation, pursuant to the Supremacy Clause of Article VI of the Constitution, federal law governs.

IV. ORDERING CLAUSES

51. Accordingly, pursuant to section 253 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 253, IT IS ORDERED that the Petition for Preemption, Declaratory Ruling and Injunctive Relief filed by Classic Telephone, Inc. IS GRANTED to the extent discussed herein, and is in all other respects DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

Acting Secretary

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[124] Classic Petition at 15.

FEDERAL COMMUNICATIONS COMMISSION

In the Matter of Classic Telephone, Inc. Petition for Emergency Relief, Sanctions and Investigation

CCBPol 96-10, FCC 97-335

Released: September 24, 1997
Adopted: September 23, 1997

MEMORANDUM OPINION AND ORDER

By the Commission

I. INTRODUCTION

1. On December 6, 1996, Classic Telephone, Inc. (Classic) filed the above-captioned Petition for Emergency Relief, Sanctions and Investigation (Petition for Emergency Relief). Classic contends that the cities of Bogue and Hill City, Kansas (the Cities) have failed to reconsider their denials of Classic's franchise applications pursuant to the Commission's Classic Telephone Preemption Order[1] issued on October 1, 1996. Based on this contention, Classic asks the Commission to take enforcement action against the Cities and provide other affirmative relief. We conclude that the enforcement action requested by Classic is unwarranted in the circumstances before us. Accordingly, we deny the Petition. We are extremely concerned, however, that unreasonable delays in acting on franchise applications can thwart local exchange competition

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[1] *Classic Telephone, Inc., Petition for Preemption, Declaratory Ruling and Injunctive Relief, Memorandum Opinion and Order*, 11 FCC Rcd 13082 (1996) (preempting the Cities' decisions denying Classic's franchise applications for the provision of local telecommunications services).

in contravention of the Telecommunications Act of 1996.[2] Thus, we believe that the Cities must act promptly on any future franchise applications filed by Classic.

II. BACKGROUND AND PROCEDURAL HISTORY

2. In May 1995, soon after entering into a purchase and sale agreement to acquire the Hill City Exchange[3] from the United Telephone Company of Kansas (United), Classic applied for local telephone franchises to serve the cities of Hill City and Bogue, Kansas.[4] Each city had previously granted a franchise to another company, Rural Telephone Service Co. (Rural), to construct and operate a telephone system within the Cities.[5]

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[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § § 151 et seq. (1996 Act). Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. Since the 1996 Act amended the Communications Act of 1934, we will refer to the Communications Act of 1934, as amended, as the "Communications Act" or the "Act."

[3] The Hill City Exchange serves both Hill City and Bogue, Kansas. 11 FCC Rcd at 13083, P 2.

[4] Under Kansas law, a telephone company must obtain a certificate of convenience and necessity from the Kansas State Corporation Commission (KCC) as well as a municipal franchise in order to provide telephone service in a particular service area. See *United Telephone Co. of Kansas v. City of Hill City*, 258 Kan. 208, 899 P.2d 489 (Kan. Sup. Ct. 1995). See P 8 infra for a discussion of the issuance of a state certificate of convenience and necessity to Classic.

[5] *See United Tel. Co. of Kansas*, 258 Kan. at 214. Hill City granted Rural a franchise on March 7, 1994. It is unclear from the record exactly when Bogue granted Rural a franchise.

The Cities denied Classic's franchise applications.[6] In their decisions, the Cities cited concerns regarding the ability of the service area to support two telephone exchange carriers.[7] The Cities also relied on a comparison of the relative capabilities of Classic and Rural to provide local telephone service.[8] On February 14, 1996, Classic formally requested that Hill City and Bogue reconsider their denials of Classic's franchise applications in light of the recent enactment of the 1996 Act, in which a primary goal is to encourage competition in the local exchange telephone market.[9] The Cities rejected these requests.

3. As a result, on March 19, 1996, Classic filed its Preemption Petition. In that Petition, Classic alleged that the Cities had blocked Classic's entry into the local exchange telephone market in violation of Section 253 of the Communications Act, which provides that "no State or local

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[6] *See* Petition for Preemption, Declaratory Ruling and Injunctive Relief (Preemption Petition), Exhibit 4, Letter from City of Hill City, Kansas, to Classic Telephone, Inc. (Sept. 20, 1995) denying telephone franchise (Hill City Initial Decision); Preemption Petition, Exhibit 10, City Council of the City of Bogue, Kansas, Resolution Denying the Request for the Issuance of a Telephone Franchise to Classic Telephone, Inc., No. 396-1 (Mar. 11, 1996) (Mar. 11, 1996 Bogue Decision on Recon.). Hill City denied Classic's franchise application pursuant to a written decision on September 20, 1995. It appears from the record that Bogue initially did not issue a formal written decision denying Classic's franchise application and instead conveyed its denial to Classic orally. After further proceedings, however, Bogue issued a formal written decision on March 11, 1996, denying Classic's franchise application and stating the reasons for its decision.

[7] *See* Preemption Petition, Exhibit 4, Hill City Initial Decision and Exhibit 10, Mar. 11, 1996 Bogue Decision on Recon.

[8] Id.

[9] *See* Joint Managers' Statement, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996).

statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[10]

4. After notice and an opportunity for public comment on Classic's Preemption Petition,[11] the Commission issued the Classic Telephone Preemption Order on October 1, 1996. In that Order, the Commission concluded that "the manner in which the Cities implemented their franchise requirements, as reflected in their decisions denying Classic's franchise requests, prohibits Classic from providing interstate and intrastate telecommunications services in Bogue and Hill City, Kansas . . . and appear[s] to violate section 253(a). . . ."[12] In addition, the Commission found that the Cities had failed to show that their reasons for denying the franchise applications fell within the scope of permissible state and local regulatory action under section 253(b).[13] The Commission also found that because the Cities did not provide any support for their contention that section 253(c), concerning rights-of-way management, permitted their decisions, the Cities had not established an

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[10] 47 U.S.C. § 253(a).

[11] 11 FCC Rcd. at 13089, P 12.

[12] *Id.* at 13096, P 26.

[13] *Id. at 13101, P 36.* Section 253(b) provides that "nothing in [section 253] shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b).

adequate premise to invoke the provisions of section 253(c).[14] Consequently, the Commission concluded that "section 253 preempts the Cities from enforcing their franchise requirements as reflected in the record in this proceeding -- with the effect of precluding Classic from providing local telecommunications services within the Cities."[15] The Commission added that it "expected the Cities to expeditiously reconsider Classic's franchise applications, i.e., within 60 days from the release of this order, in a manner consistent with [the Commission's] opinion."[16]

5. The Cities filed a Petition for Review of the Commission's Classic Telephone Preemption Order with the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) on November 22, 1996.[17] At that time, the Cities did not seek a stay of the Classic Telephone Preemption Order from either the Commission or the court. On December 20, 1996, in response to a motion by the

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[14] 11 FCC Rcd at 13103, P 40. Section 253(c) provides that "nothing in [section 253] affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." 47 U.S.C. § 253(c).

[15] 11 FCC Rcd at 13108, P 50.

[16] *Id.*

[17] *City of Bogue, Kansas and City of Hill City, Kansas v. Federal Communications Comm'n*, No. 96-1432 (D.C. Cir. filed Nov. 22, 1996).

Commission for expedited review, the court issued an order establishing an expedited briefing schedule.[18]

6. On December 6, 1996, Classic filed the present Petition for Emergency Relief with the Commission. The Common Carrier Bureau issued a public notice establishing a pleading cycle for comments on Classic's Petition shortly thereafter.[19] On December 27, 1996, the Cities filed an Emergency Petition for Writ in the Nature of Prohibition and Request for Ruling by January 10, 1997 with the D.C. Circuit.[20] The Cities requested that the court issue "a writ of prohibition directed against the Federal Communications Commission . . . to prevent the [Commission] from proceeding with the enforcement action announced in its December 13, 1996 [Public Notice]."[21] Alternatively, the Cities asked the Court to consider their Petition as an emergency motion for stay of the Classic Telephone Preemption Order.[22]

7. In an Order issued on January 14, 1997, the D.C. Circuit denied the Cities' Petition for Writ of Prohibition, stating that the Cities had not demonstrated that they had "a clear and

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[18] *City of Bogue, Kansas and City of Hill City, Kansas v. Federal Communications Comm'n*, No. 96-1432 (D.C. Cir. Dec. 20, 1996) (Order establishing briefing schedule).

[19] Pleading Cycle Established for Comments on Classic Telephone, Inc.'s Petition for Emergency Relief, Sanctions and Investigation, Public Notice, CCBPol 96-10, DA 96-2110 (rel. Dec. 13, 1996) (Public Notice).

[20] Emergency Petition for Writ in the Nature of Prohibition and Request for Ruling by January 10, 1997, Case No. 96-1498 (filed Dec. 27, 1996) (Petition for Writ of Prohibition) at 1-2.

[21] *Id.*

[22] *Id.* at 1 n.1.

indisputable right to relief."[23] In the same Order, the court, on its own motion, vacated its December 20, 1996, Order granting expedited review of the Classic Telephone Preemption Order and ordered that proceedings in the appeal of the Classic Telephone Preemption Order be held in abeyance pending further order of the court. The court ordered the parties to file status reports concerning the Commission's proceedings on Classic's Petition for Emergency Relief, and directed the parties "to submit motions to govern further proceedings within 30 days after [the Commission] issues a final order in connection with Classic's petition."[24]

8. On February 7, 1997, Classic announced that it would not close its purchase and sale agreement with United to acquire the Hill City Exchange, citing its inability to obtain a local franchise.[25] The Cities, however, claim that Classic did not complete its purchase of the Hill City Exchange because it could not obtain financing.[26] The KCC subsequently held that its certification of Classic as a local exchange carrier in Kansas was contingent upon Classic's purchase of the Hill City Exchange from United, and concluded that Classic never had

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[23] *City of Bogue, Kansas and City of Hill City, Kansas v. Federal Communications Comm'n.*, No. 96-1432, and City of Bogue, Kansas and City of Hill City, Kansas, No. 96-1498 at 2 (D.C. Cir. Jan. 14, 1997) (Order denying emergency petition).

[24] *Id.*

[25] Letter from John D. Seiver, Counsel for Classic, Cole, Raywid & Braverman, L.L.P., to William F. Caton, Acting Secretary, Federal Communications Commission, filed Feb. 18, 1997 (Classic's Feb. 18 ex parte letter).

[26] Letter from Timothy E. Welch, Counsel for the Cities, Hill & Welch, to William F. Caton, Acting Secretary, Federal Communications Commission, filed Mar. 25, 1997 (Cities' Mar. 25 ex parte letter).

an effective certificate of public convenience and necessity.[27] Classic has applied to the KCC for certification as a competing local exchange carrier in Hill City and Bogue, and this application is still pending.[28]

III. POSITIONS OF THE PARTIES

A. Classic's Petition

9. In its Petition for Emergency Relief, Classic argues that the Cities have refused to comply with the Classic Telephone Preemption Order and have not reconsidered Classic's franchise

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[27] The KCC modified its previous Order in which it stated that it was decertifying Classic as a local exchange carrier in Kansas. Application of United Telephone Company of Kansas and Classic Telephone, Inc. for Permission for United to Cease Operating as a Telephone Public Utility in its Ellis, Hill City, Quinter and WaKeeney Exchanges, to Grant to Classic a Certificate of Public Convenience for the Ellis, Hill City, Quinter and WaKeeney Exchanges, and for Authority to Transfer the Franchise, Property, Plant and Equipment of United Located in the Ellis, Hill City, Quinter and WaKeeney Exchanges to Classic and Complete All Matters Incident to the Transfer, Docket No. 192,521-U 95-CLST-508-COC, Order, at 7-10, PP 19-24 (rel. Jun. 4, 1997).

[28] *See* Letter from John C. Dodge, Counsel for Classic, Cole, Raywid & Braverman, L.L.P., to William F. Caton, Acting Secretary, Federal Communications Commission, filed Aug. 13, 1997 (Classic's Aug. 13 ex parte letter). Classic was granted certification by the KCC as a competing local exchange carrier for the service areas of Southwestern Bell Telephone Company and Sprint/United Telephone, which do not include the area served by the Hill City Exchange, on June 23, 1997. Application of Classic Telephone, Inc. for Certificates of Public Convenience to Provide Basic Local Telecommunications Services, Local Exchange Telecommunications Services, Exchange Access Services and Interexchange Telecommunications Services in Kansas, Docket No. 97-CLST-634-COC, Order and Certificate (rel. Jun. 23, 1997).

applications as required by the Commission.[29] Classic alleges that the Cities' strategy in this proceeding "is to ignore the law long enough to deny Classic a real competitive opportunity in [the Cities]."[30] Classic contends that the Commission must direct the Cities to grant Classic's franchise applications or risk undermining the effectiveness of section 253 in removing state and local barriers to competition.[31]

10. In its Petition, Classic contends that the Commission's authority under the 1996 Act "extends to the power to strike the [entry] barrier and issue injunctions."[32] Classic requests that the Commission issue an emergency order enjoining the Cities from taking any action that interferes with Classic's provision of telecommunications services within their boundaries. Classic also requests that the Commission find that the Cities' inaction justifies the issuance of an order granting Classic a franchise "and all other necessary authority for Classic to engage in the provision of intrastate telecommunications service within the Cities."[33] In addition, Classic asks that the Commission: (1) impose sanctions on the Cities, "including but not limited to

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[29] Classic Petition at 1. Classic submits several attachments to its comments as evidence of this claim. Id. at 3, Exhibits A, B, and C.

[30] Classic Petition at 9.

[31] *Id.* at 9-10; see also TCG Comments at 3-4.

[32] Classic Petition at 7 (citing, inter alia, *47 U.S.C. § 154*(i) and (j); *Southwestern Cable Co. v. Federal Communications Comm'n*, 392 U.S. 157 (1994); and *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, 3 FCC Rcd 3195 (1988)); *see* ALTS Comments at 4.

[33] Classic Petition at 10.

attorneys [sic] fees and costs[;]"[34] (2) notify the Cities of their "apparently willful violation of Section 253 of the Communications Act . . . and the Commission's Order in this proceeding and assess a forfeiture in an amount to be determined pursuant to Title V and this Commission's rules and regulations[;]"[35] (3) direct the Cities to show cause why the Commission should not initiate further proceedings to assess additional forfeitures for continued violations of the 1996 Act; and (4) grant any other relief that the Commission determines is appropriate.[36] Classic requests that the Commission grant the requested relief on an expedited basis.[37]

B. Comments and Replies

11. Four parties, including the Cities, filed comments in response to Classic's petition.[38] Both Classic and the Cities filed reply comments. In addition, Classic and the Cities made ex parte presentations to the Commission staff.[39]

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[34] *Id.*

[35] *Id.* at. at 10-11.

[36] *Id.*

[37] *Id.* at 5.

[38] Parties filing comments in the instant proceeding include: the Association for Local Telecommunications Services (ALTS); AT&T Corp.; the Cities (Bogue and Hill City, Kansas); and Teleport Communications Group Inc. (TCG).

[39] *See* Letter from John C. Dodge, Counsel for Classic, Cole, Raywid & Braverman, L.L.P., to William F. Caton, Acting Secretary, Federal Communications Commission, filed Jan. 14, 1997 (regarding Bogue's response to KCC's motion to decertify Classic) (Classic's Jan. 14 ex parte letter); Letter from Timothy E. Welch, Counsel for the Cities, Hill & Welch, to William F. Caton, Acting Secretary, Federal Communications

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[39](...continued)
Commission, filed Jan. 22, 1997 (regarding ex parte meeting between counsel for the Cities and the senior legal advisor to Commissioner Ness); Letter from Timothy E. Welch, Counsel for the Cities, Hill & Welch, to William F. Caton, Acting Secretary, Federal Communications Commission, filed Jan. 24, 1997 (regarding ex parte meeting between counsel for the Cities and Common Carrier Bureau staff); Letter from Timothy E. Welch, Counsel for the Cities, Hill & Welch, to William F. Caton, Acting Secretary, Federal Communications Commission, filed Jan. 27, 1997 (supplement to January 24, 1997 filing) (Cities' Jan. 27 ex parte letter); Classic's Feb. 18 ex parte letter; Letter from John D. Seiver, Counsel for Classic, Cole, Raywid & Braverman, L.L.P., to William F. Caton, Acting Secretary, Federal Communications Commission, filed Mar. 12, 1997 (regarding ex parte meeting between counsel for Classic and Common Carrier Bureau staff); Cities' Mar. 25 ex parte letter; Letter from John D. Seiver, Counsel for Classic, Cole, Raywid & Braverman, L.L.P., to William F. Caton, Acting Secretary, Federal Communications Commission, filed Apr. 4, 1997 (regarding Classic's petition for reconsideration of the KCC's decertification of Classic as a local exchange company) (Classic's Apr. 4 ex parte letter); Letter from John D. Seiver, Counsel for Classic, Cole, Raywid & Braverman, L.L.P., to William F. Caton, Acting Secretary, Federal Communications Commission, filed May 23, 1997 (regarding Classic's application to KCC for certification as competing local exchange carrier); Letter from John D. Seiver, Counsel for Classic, Cole, Raywid & Braverman, L.L.P., to William F. Caton, Acting Secretary, Federal Communications Commission, filed June 2, 1997 (regarding Classic's application to KCC for certification as competing local exchange carrier); Letter from John D. Seiver, Counsel for Classic, Cole, Raywid & Braverman, L.L.P., to William F. Caton, Acting Secretary, Federal Communications Commission, filed June 24, 1997 (regarding KCC's denial of Classic's petition for reconsideration of KCC Order modifying KCC's previous decertification Order); Letter from John D. Seiver, Counsel for Classic, Cole, Raywid & Braverman, L.L.P., to William F. Caton, Acting Secretary, Federal Communications Commission, filed June 25, 1997 (regarding Classic's intention to file application with KCC for certification as competing local exchange carrier for the Cities and other service areas); Letter from Timothy E. Welch, Counsel for the Cities, Hill & Welch, to William F. Caton, Acting Secretary, Federal Communications Commission, filed June 30, 1997 (regarding Classic's June 24 and June 25 ex parte

(continued...)

1. Supporting Comments

12. ALTS and TCG generally support Classic's position.[40] TCG argues that unless the Commission enforces its original Order, it risks serious erosion of the effectiveness of section 253.[41] Thus, TCG urges the Commission to grant the relief requested by Classic.[42] ALTS also urges the Commission to "take whatever action is necessary to ensure that Classic is no longer denied the right to provide service in [the Cities]."[43] AT&T states that it supports the mandate of the 1996 Act, and the Commission's policy, that "all legal and regulatory barriers to local services competition be eliminated."[44]

13. TCG also alleges that it faces regulatory delays and other barriers to entry by many state and municipal governments that prefer one service provider to another.[45] TCG therefore asks that the Commission clarify that sections 253(b) and (c) of the Act do not grant new regulatory powers to states and localities, but rather preserve, subject to certain conditions, preexisting powers held by the states or delegated to their

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[39](...continued)
letters); Classic's Aug. 13 ex parte letter.

[40] *See*, e.g., ALTS Comments at 3; TCG Comments at 3-6.

[41] TCG Comments at 3-4.

[42] *Id.* at 4.

[43] ALTS Comments at 3.

[44] AT&T Comments at 2.

[45] TCG Comments at 2.

political subdivisions.[46] TCG also objects to the fact that in some states, new entrants must obtain franchises from both state and local authorities in order to provide local telephone service. In addition, TCG challenges the informal practice by many local officials of considering new entrants' qualifications to provide service in other contexts even after a grant of a state franchise.[47] TCG therefore urges the Commission to clarify that for purposes of section 253, "a finding by a state [agency] that a telecommunications provider has the . . . qualifications to provide telecommunications statewide creates a strong presumption that those qualifications exist in every community in the state."[48] In states that do not explicitly authorize local franchising of telecommunications providers, TCG argues that the presumption should be conclusive.[49] TCG also asks that the Commission clarify that section 635A of the Communications Act,[50] which insulates cable television franchising authorities from any monetary damages arising from claims related to the regulation of cable service, is not applicable to actions taken by

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[46] *Id.* at 2, 9-10.

[47] *Id.* at 10-11. According to TCG, Kansas is the only state in which the state and local governments are granted, by statute, dual franchising authority for telecommunications service. In several other states, however, TCG alleges that local governments have questioned TCG's qualifications to provide service despite the state commission's certification, with resulting delays in TCG's entry into their markets for telecommunications services. *Id.*

[48] *Id.*

[49] Id.

[50] 47 U.S.C. § 555a.

local governments under the auspices of their telecommunications franchising authority.[51]

2. Cities' Opposition

14. The Cities oppose Classic's Petition and urge the Commission to "terminate the instant proceeding without taking any action against the Cities."[52] The Cities contend that the Commission concluded in the Classic Telephone Preemption Order that the 1996 Act "authorizes the Commission to review state telephone exchange franchise decisions and to issue orders to the states compelling them to follow certain procedures and to issue local telecommunications exchange franchises."[53] The Cities argue that, when interpreted in this fashion, the 1996 Act is unconstitutional as a violation of the Tenth Amendment.[54] In support of this position, the Cities rely on New York v. United States,[55] arguing that the Commission lacks constitutional authority to compel state and local governments to adopt

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[51] TCG Comments at 6.

[52] Cities' Comments at 4

[53] *Id.*, Attachment at 15.

[54] *Id.*

[55] 505 U.S. 144 (1992) (holding that "while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so").

regulatory policies to further federal regulation of interstate commerce.[56]

15. The Cities also assert that the Commission lacks jurisdiction to conduct the instant proceeding, citing *Greater Boston Television Corp. v. Federal Communications Comm'n* to the effect that "once a petition for review has been filed in court, the [Commission] has no authority to conduct further proceedings without the court's approval."[57] The Cities state that they are currently seeking review of the Classic Telephone Preemption Order in the D.C. Circuit and that the issues before the court are the same issues raised in the present proceeding.[58] The Cities add that there is no evidence that the Commission has obtained such judicial approval for further proceedings.[59]

16. In addition, the Cities claim that the Commission's issuance of the Public Notice initiates an enforcement proceeding and thus "constitutes a clear abuse of discretion."[60] The Cities claim that the Commission's decision to seek public comment on Classic's Petition is improper because it "appears calculated merely . . . to apply pressure on [the Cities] to cave in on the constitutional argument . . . and to otherwise inconvenience [the Cities]."[61] The Cities assert that the Commission has prejudged the issues raised in Classic's

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[56] Cities' Comments, Attachment at 16.

[57] *Id.*, Attachment at 5, citing *Greater Boston Television Corp. v. Federal Communications Comm'n,* 463 F.2d 268, 283 (D.C. Cir. 1971).

[58] *Id.* at 1.

[59] *Id.*, Attachment at 6.

[60] *Id.* at 2-3, Attachment at 7.

[61] *Id.* at 2, Attachment at 13.

Petition for Emergency Relief, as evidenced by the Commission's statements to the effect that the Cities have violated the Communications Act and failed to comply with the Classic Telephone Preemption Order in the Commission's December 19, 1996, Emergency Motion filed with the D.C. Circuit.[62]

17. Moreover, the Cities allege that the Commission improperly waived the ex parte communication prohibition in the Public Notice without explanation, designating the instant proceeding as non-restricted for purposes of the Commission's ex parte rules.[63] The Cities argue that the present proceeding is properly classified as an adjudication, and that section 1.1208(c)(ii)(A) of the Commission's rules provides that adjudications are restricted, with ex parte communications prohibited. The Cities assert that classification of the pending proceeding as non-restricted "appears calculated to prejudice Petitioners unfairly."[64] They cite the burden of obtaining copies of the summaries of oral ex parte presentations,[65] and state that they have experienced difficulty obtaining information from the

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[62] *Id.*, Attachment at 8, citing Federal Communications Commission Emergency Motion for Expedited Review, No. 96-1432 (D.C. Cir. filed Dec. 19, 1996). The Commission's Emergency Motion for Expedited Review states that the Cities "apparently have taken no steps to remedy their violation of section 253 of the 1996 Act." Id. at 2. The Motion also refers to "Petitioners' continuing failure to reconsider Classic's franchise applications." *Id.*

[63] *Id.*, Attachment at 9-12.

[64] *Id.*, Attachment at 10.

[65] *Id.* at 12.

Commission's public files.[66] The Cities argue that all ex parte filings in this proceeding should have been served on the Cities.[67]

18. Finally, the Cities argue that "by filing petitions for review with the Court of Appeals, [the Cities] must necessarily have reconsidered their decisions denying Classic's franchise applications."[68] The Cities expand on this point in their ex parte filings, claiming that Classic did not approach the Cities after release of the Classic Telephone Preemption Order, either to provide financial information which the Cities had previously requested or for any other purpose related to reconsideration of Classic's franchise applications.[69] The Cities therefore recommend that the Commission dismiss Classic's Petition for failure to prosecute.[70]

3. Replies

19. In its Reply, Classic argues that absent a stay by the Commission or the courts, the Classic Telephone Preemption Order remains in full force pending action on appeal, and that the Commission retains the authority to enforce the Classic Telephone Preemption Order.[71] Classic also asserts that "the issues concerning section 253 that the Cities selected for appeal are not the same as the enforcement issues that Classic raised

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[66] Cities' Jan. 27 ex parte letter.

[67] Cities' Comments, Attachment at 12.

[68] *Id.* at 2.

[69] Cities' Jan. 27 ex parte letter.

[70] *Id.*

[71] Classic Reply at 4; see also ALTS Comments at 3.

in its emergency petition."[72] Classic notes that the Cities could have sought to stay enforcement of the Classic Telephone Preemption Order in their Petition for Review, but did not do so.[73]

20. Classic asserts that the Classic Telephone Preemption Order is fully consistent with the Tenth Amendment,[74] and does not compel the Cities to adopt a regulatory scheme contrary to the dictates of *New York v. United States*.[75] Instead, Classic argues that section 253 of the Act provides for federal preemption of state or local requirements.[76] Classic also contends that Commission action granting Classic a franchise would not be contrary to the Tenth Amendment because "the federal government's authority to direct state officers to take or refrain from taking certain actions is well established."[77]

21. Classic views as insupportable the Cities' claims that they have been or will be denied an opportunity to be heard on whether they violated the Classic Telephone Preemption Order. Classic maintains that the Cities fully participated in the phase of the proceeding leading up to the Classic Telephone Preemption Order, and that the Cities had the opportunity to file comments and reply comments in the present enforcement

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[72] Classic Reply at 2-3.

[73] *Id.*

[74] *Id.* at 5.

[75] *Id.* at 7; see *New York v. United States,* 505 U.S. 144 (1992).

[76] *Id.* at 6.

[77] *Id.* at 8, citing *FERC v. Mississippi,* 456 U.S. 742 (1982).

phase of this proceeding.[78] Classic also argues that there is no basis for concluding that the Commission has prejudged the issues in this proceeding.[79] Moreover, Classic argues that the Commission's designation of this proceeding as non-restricted for purposes of ex parte communications is entirely proper, contending that the Cities misconstrue the Commission's rules regarding when a proceeding is restricted.[80] Classic states that the "permit but disclose procedures" allow the Cities, as well as all other interested parties, to make ex parte presentations to Commission staff, subject to appropriate disclosure requirements, and do not prejudice the Cities.[81]

22. The Cities contend in their Reply that the Commission has admitted that section 253 and the Classic Telephone Preemption Order are unconstitutional or, in the alternative, that the Commission has instituted the present proceeding "merely to abuse the Cities."[82] In particular, the Cities assert that if the Classic Telephone Preemption Order does not compel them to implement a federal regulatory program, "there is no order for the Cities to violate."[83] In that case, the Cities assert that "the Commission has instituted the present enforcement action merely to abuse the Cities in an attempt to

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[78] *Id.* at 11.

[79] *Id.* at 12-13.

[80] *Id.* at 14-15.

[81] *Id.* at 11, 16.

[82] Cities' Reply at 1, citing Federal Communications Commission's Opposition to the Cities' "Emergency Petition for Writ in the Nature of Prohibition and Request for Ruling by January 10, 1997," No. 96-1498 (D.C. Cir. filed Jan. 7, 1997).

[83] *Id.*

get them to succumb to whatever 'expectation' the Commission may hold vis-a-vis local telephone franchising issues."[84] On the other hand, the Cities assert that if the Classic Telephone Preemption Order does require the Cities to comply with the federal regulatory program prescribed in section 253, then the Order is invalid.[85]

23. In addition, the Cities contend that neither section 253(d) of the Communications Act nor section 1.282 of the Commission's rules gives the Commission authority to conduct a proceeding to enforce the Classic Telephone Preemption Order.[86] The Cities also assert that, pursuant to section 401(b) of the Communications Act, the Commission may not conduct its own proceedings to enforce the Classic Telephone Preemption Order but, rather, must seek an injunction from a federal district court.[87]

III. DISCUSSION

24. Contrary to the Cities' contentions, we find that the Commission has jurisdiction to address the present Petition despite the pending appeal of the Classic Telephone Preemption Order. In its January 14, 1997, Order denying the Cities' Petition for Writ of Prohibition, the D.C. Circuit held in abeyance proceedings on the Cities' Petition for Review of the Classic Telephone Preemption Order. The court also directed the parties, including Classic, the Cities, and the Commission, "to submit motions to govern further proceedings within 30 days after [the Commission] issues a final order in connection

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[84] *Id.* at 2.

[85] *Id.*

[86] Cities' Jan. 27 ex parte letter.

[87] Cities' Reply, Attachment at 3-4.

with Classic's petition for emergency relief, sanctions, and investigation, which is currently pending before [the Commission]."[88] Thus, the court's Order clearly contemplates that the Commission will act on Classic's Petition for Emergency Relief and is consistent with the general principle that, absent a stay, an agency order remains operative pending appellate review.[89]

25. We are not persuaded that the Commission's action in this proceeding is contrary to *Greater Boston Television Corp. v. FCC*,[90] as argued by the Cities. Greater Boston required that the Commission obtain judicial approval for further proceedings in certain types of cases that are subject to pending petitions for review. Even if we assume that this proceeding is the type of case to which Greater Boston should apply, the D.C. Circuit has effectively granted permission for Commission action on Classic's Petition for Emergency Relief by holding the review proceedings in abeyance pending Commission action on the Classic Petition. Moreover, we do not believe that this proceeding is the type of case to which Greater Boston applies, since Classic has asked the Commission to enforce the Classic Telephone Preemption Order, not reconsider our directives in that Order. Thus, we reject the Cities' contention that the Commission lacks jurisdiction to examine the issues raised in the Petition for Emergency Relief merely because the

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[88] *City of Bogue, Kansas and City of Hill City, Kansas v. Federal Communications Comm'n*, No. 96-1432 and City of Bogue, Kansas and City of Hill City, Kansas, No. 96-1498 (D.C. Cir. Jan. 14, 1997) (Order denying Cities' Emergency Petition).

[89] *See* 28 U.S.C. § 2349(b).

[90] 463 F.2d 268 (D.C. Cir. 1971).

Cities filed a Petition for Review of the Classic Telephone Preemption Order.[91]

26. In the present circumstances, however, we decline to grant the relief requested by Classic. As noted above, Classic originally applied to the Cities for franchises to provide intrastate telecommunications services based on its agreement to purchase the Hill City Exchange from United. On February 7, 1997, however, Classic announced that it would not complete the purchase, citing its inability to obtain a local franchise.[92] Classic stated that it intends to provide telecommunications service in the Cities "utilizing other strategies and facilities," for which Classic must obtain franchises from the Cities.[93] Since Classic no longer proposes to provide service using the facilities described in its previously-filed franchise application, it appears that approval of the original franchise application would not constitute proper authority for Classic to provide service to the Cities under an alternative plan. Under these circumstances, there would be little point to favorable action on Classic's previously-filed franchise application.

27. We are very concerned that there may be merit to Classic's contention that it likely will face unreasonable delay by the Cities in the processing of any future franchise applications, given the Cities' past decision not to issue a written reconsideration order and reports concerning the views

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[91] Cities' Comments at 2, Attachment at 6.

[92] Cities' Feb. 18 ex parte letter, Enclosure, J. Merritt Belisle, CEO, Classic Communications, Inc., Press Release (Feb. 7, 1997) (announcing decision to abandon efforts to acquire Hill City Exchange).

[93] *Id.* at 2.

of Bogue and Hill City officials on this proceeding.[94] At this time, however, we choose not to take action that would foreclose the Cities from having a reasonable opportunity to review and take action on new or amended franchise applications by Classic in a timely fashion, consistent with the requirements of section 253 of the Communications Act. Accordingly, we deny Classic's request that we enjoin the Cities and that we require the Cities to grant Classic a franchise "and all other authority necessary" to provide intrastate telecommunications service in the Cities. We also deny Classic's request that we impose sanctions on the Cities under the present circumstances.

28. We make clear, however, the Commission's serious concerns about the potential adverse effect on the development of local exchange competition caused by unreasonable delay by local governments in processing franchise applications and other permits. If a potential entrant is unable to secure the necessary regulatory approvals within a reasonable time, it may

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[94] *See* Classic's Jan. 14 ex parte letter ("'The [KCC] Staff should recognize that Bogue now has model service and quit trying to force other companies on Bogue,'" quoting Bogue's Response to [KCC] Staff's Motion to Decertify Classic and Affirm United's Certificate and Motion for Expedited Order Declaring the Transfer Agreement Abandoned and Void, Docket No. 192,521-U 95-CLST-508-COC, 190,843-U, 94-RRLT-569-COC (rel. Jan. 2, 1997)); Classic's Apr. 4 ex parte letter ("'If Bogue is not successful in its appeal from the [Classic Telephone Preemption Order], it will formally reconsider its decision and will offer many, many reasons [why] neither United or Classic should have access to its streets and public ways,'" quoting Brief for Plaintiff at 4, City of Bogue, Kansas v. The State Corporation Commission of the State of Kansas, No. 96-1082-JTM (D. Kan. filed Feb. 27, 1997); Linda Mowery-Denning, FCC Order No Worry to Hill City officials, Salina Journal, October 9, 1996, at A1, A7 ("Hill City Mayor Rod Radcliffe hasn't lost any sleep over the [Classic Telephone Preemption Order]. 'I'm not really concerned,' he said. . . . 'We have our new $ 7 million phone system up and running and it's absolutely fantastic.'").

abandon its efforts to enter a particular market based solely on the inaction of the relevant government authority. Here it is notable that Classic alleges that it is declining to purchase the Hill City Exchange due to its inability to obtain a local franchise. Although we recognize that the Cities dispute Classic's allegation,[95] we also note that regulatory delays may threaten the viability of financing arrangements for new entry or transactions for the purchase of existing facilities. Such results would seriously undermine the development of local competition, and run counter to Congress' procompetitive goals in the 1996 Act. More specifically, in certain circumstances a failure by a local government to process a franchise application in due course may "have the effect of prohibiting" the ability of the applicant to provide telecommunications service, in contravention of section 253.

29. We are especially troubled, moreover, by the Cities' failure to reconsider Classic's franchise applications in a meaningful fashion before Classic abandoned its plans to purchase the Hill City Exchange from United on February 7, 1997. The Cities claim that they reconsidered their decisions denying Classic's franchise applications, as evidenced by their filing of a Petition for Review of the Classic Telephone Preemption Order with the D.C. Circuit.[96] Even assuming that the Cities' claim is valid, the Cities' decision not to issue written orders reexamining their decisions on Classic's franchise applications effectively precludes Commission review and a determination of whether the reasoning articulated in support of a denial satisfies the requirements of section 253(b) or (c) of the Act. We can conclude at most that by filing a Petition for Review with the D.C. Circuit, the Cities have

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[95] *See* supra P 8.

[96] Cities' Comments at 2.

reaffirmed, without additional explanation, the very franchise denials that the Commission previously preempted.

30. Accordingly, we wish to make clear that if the Cities fail to act on any new or revised franchise applications filed by Classic within a reasonable period of time, the Commission, upon appropriate request and after an opportunity for comment by interested parties, will consider whether to take further action pursuant to section 253 or other provisions of the Communications Act. Possible actions which might be considered include, for example, preemption of the Cities' franchising requirements as they apply to Classic. Any decision on whether to take further action and, if so, what action is warranted, would be based on the facts and circumstances as well as the legal and policy arguments reflected in the record before the Commission at that time.

31. We find it unnecessary to address the remaining issues raised by Classic and the Cities in light of our decision to deny Classic's Petition, although we will address briefly the Cities' charges concerning the propriety of our handling of Classic's Petition for Emergency Relief and the application of our ex parte rules in this proceeding.

32. Contrary to the Cities' apparent understanding, the Commission routinely issues public notices to allow interested parties to comment on petitions requesting action by the Commission. The purpose of issuing the Public Notice in response to Classic's request for relief was to give all interested parties, including the Cities, an opportunity to respond to the issues raised by Classic. In issuing a public notice that establishes a pleading cycle on a filing, the Commission does not indicate a view on the merits of the issues involved. Rather, the Commission seeks to obtain a complete and accurate record on which to resolve the issues. We therefore find baseless the Cities' contention that the Commission abused its discretion or somehow prejudged the issues by issuing a public notice

requesting comment on Classic's Petition for Emergency Relief. We also conclude that the statements of Commission counsel in the Emergency Motion for Expedited Review cannot reasonably be construed as prejudgment of the issues raised by Classic's Petition. Although in that court filing, Commission counsel very briefly noted that the Cities apparently had not reconsidered Classic's franchise applications, this should not be interpreted to mean that the Commission would refuse to consider subsequently-filed comments addressing this issue.

33. We also conclude that the designation of this proceeding as non-restricted, so that ex parte presentations are generally permissible but subject to disclosure, is a reasonable exercise of the Commission's broad and well-established authority under sections 4(i) and (j) of the Communications Act to conduct its proceedings "as will best conduce to the proper dispatch of business and to the ends of justice,"[97] and to "issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[98] The Commission's ex parte rules also permit us to modify ex parte requirements,[99] n99 and the Commission has frequently designated proceedings involving broad policy issues for non-restricted treatment in the

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[97] 47 U.S.C. § 154(j).

[98] *Id.* § 154(i).

[99] Section 1.1200(a) of the Commission's rules, which applied to this proceeding prior to June 2, 1997, provides that "where the public interest so requires in a particular proceeding, the Commission retains the discretion to issue public notices setting forth modified or more stringent ex parte procedures." 47 C.F.R. § 1.1200(a) (1996). The recently amended section 1.1200(a), which became effective June 2, 1997, provides the Commission and its staff with similar authority. See Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings, GC Docket No. 95-21, Report and Order, FCC 97-92, Appendix B (rel. March 19, 1997) (codified at 47 C.F.R. § 1.1200(a)).

belief that this facilitates the compilation of a complete record. Although Classic's Petition is in many respects adjudicatory in nature, it is also the first request for Commission enforcement of a preemption order under section 253(d) of the Communications Act, and thus also raises broad policy issues of future applicability commonly found in rulemaking proceedings. Our action designating this proceeding as non-restricted and giving all parties full and fair notice of the applicable ex parte procedures in our December 13, 1996, Public Notice is reasonable. Our intention in permitting ex parte presentations was to facilitate the compilation of a complete record and to foster a full exploration of the issues raised by Classic's Petition. All parties were given a full opportunity to make ex parte presentations, subject to disclosure, and both Classic and the Cities have done so. We therefore conclude that the Cities' claims that the fairness of this proceeding has been compromised by the Commission's administration of its ex parte rules is without merit. Even if our action in this regard did constitute error, it is clearly harmless to the Cities given the outcome of our decision on Classic's Petition for Emergency Relief.

34. We decline to resolve most of the broader issues raised by TCG on the grounds that they are beyond the scope of this proceeding. Despite this, we conclude that it is appropriate to note certain general concerns that we have regarding local telecommunications regulation. As we recently stated in our TCI Cablevision Order,[100] we are concerned that some local governments "appear to be reaching beyond traditional rights-of-way matters and seeking to impose a redundant 'third tier' of

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[100] TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253; CSR-4790, Memorandum Opinion and Order, FCC 97-331 (rel. Sept. 19, 1997).

telecommunications regulation"[101] on top of traditional state and federal regulation consistent with the Communications Act, as amended. This "third tier" of local regulation "aspires to govern the relationships among telecommunications providers, or the rates, terms and conditions under which telecommunication service is offered to the public."[102] Such regulations are difficult to justify as "within the scope of permissible local rights-of-way management authority or other traditional municipal concerns."[103] We are concerned that local telecommunications regulations that vary from community to community will very likely discourage the development of competition. We also share TCG's concern with the possible discriminatory application of telecommunications regulation by state and local governments, and its effect on the development of competition. Thus, attempts to impose a "third tier" of telecommunications regulation at the local level "will be met

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[101] *Id.* at P 105.

[102] *Id.* The types of activities that fall within the sphere of appropriate rights-of-way management include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them. See *Classic Telephone Preemption Order,* 11 FCC Rcd at 13103, P 39, citing 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from the Office of the City Attorney, City and County of San Francisco); Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems; CS Docket No. 96-46, *Second Report and Order,* 11 FCC Rcd 18223, 18330, PP 209-10 (1996); *Third Report and Order and Second Order on Reconsideration,* 11 FCC Rcd 20227, 20309-11, PP 193-97 (rel. Aug. 8, 1996).

[103] TCI Cablevision Order at P 105.

with close scrutiny by the Commission."[104] At the same time, we recognize that "interpreting the 1996 Act is not an easy task,"[105] and requires the combined efforts of state and local governments, as well as this Commission. We must all remain mindful, however, of the fundamental purpose of the Act: "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[106]

IV. ORDERING CLAUSES

35. Accordingly, pursuant to section 253 of the Communications Act, 47 U.S.C. § 253, IT IS ORDERED that the Petition for Emergency Relief, Sanctions and Investigation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

Acting Secretary

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[104] *Id.*

[105] *Id.* at P 110.

[106] *Id.*

FEDERAL COMMUNICATIONS COMMISSION

In the Matter of Classic Telephone, Inc.

CCBPol 96-10; DA 99-170

ORDER

Adopted: January 13, 1999
Released: January 13, 1999

By the Chief, Policy and Program Planning Division:

1. On December 22, 1998, Classic Telephone, Inc. (Classic) filed a motion to dismiss [1] its October 24, 1997, petition for reconsideration of the Commission's Memorandum Opinion and Order in the above-captioned proceeding, *Classic Telephone, Inc.*, Memorandum Opinion and Order, FCC 97-335, 12 FCC Rcd 15619 (1997) (*Classic Enforcement Order*). In that order, the Commission denied Classic's "Petition for Emergency Relief, Sanctions, and Investigation" regarding Classic's efforts to enter the local telephone market in Bogue and Hill City, Kansas (the Cities). Classic states in its motion that it has decided not to provide local telephone service in the Cities and will instead focus its telecommunications efforts in other markets. Consequently, Classic states, the reasons for seeking reconsideration of the Commission's actions are now moot. [2]

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[1] Classic Telephone, Inc., Motion to Dismiss Petition for Reconsideration (filed Dec. 22, 1998) (Classic Motion).

[2] Classic Motion at 1.

2. We agree with Classic that the issues raised in its petition for reconsideration are now rendered moot by its decision not to enter the local telephone market in Bogue and Hill City, Kansas. Accordingly, we dismiss as moot Classic's October 1997 petition for reconsideration. Given Classic's decision not to provide local exchange service in Hill City and Bogue, we also dismiss as moot the "Petition for Clarification or Alternatively Petition for Reconsideration" of the *Classic Enforcement Order* filed on October 24, 1997, by the Cities.[3]

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, that the motion to dismiss filed by Classic Telephone, Inc. IS GRANTED.

4. IT IS FURTHER ORDERED, pursuant to authority delegated under Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, that the petition for reconsideration of the *Classic Enforcement Order*, filed by Classic Telephone, Inc., and the petition for clarification or, alternatively, reconsideration of the *Classic Enforcement Order*, filed by the City of Bogue, Kansas and the City of Hill City, Kansas ARE DISMISSED.

5. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
Carol E. Mattey
Chief, Policy and Program Planning Division
Common Carrier Bureau

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[3] The City of Bogue, Kansas and the City of Hill City, Kansas, Petition for Clarification or Alternatively Petition for Reconsideration (filed Oct. 24, 1997).

FEDERAL COMMUNICATIONS COMMISSION

In the Matter of Classic Telephone, Inc., Petition for Reconsideration

CCBPol 96-10; FCC 99-366

ORDER ON RECONSIDERATION

Adopted: November 22, 1999
Released: November 23, 1999

By the Commission:

1. On January 28, 1999, the cities of Bogue and Hill City, Kansas (Cities) filed a petition for reconsideration[1] of the *Classic Dismissal Order*.[2] In the *Classic Dismissal Order*, the Policy and Program Planning Division of the Common Carrier Bureau granted the motion filed by Classic Telephone, Inc. (Classic) to dismiss its petition for reconsideration[3] of the *Classic Enforcement Order*,[4] based on Classic's decision not to

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[1] The City of Bogue, Kansas and the City of Hill City, Kansas Petition for Reconsideration (filed Jan. 28, 1999).

[2] Classic Telephone, Inc., CCBPol 96-10, Order, 14 FCC Rcd 960 (1999) (*Classic Dismissal Order*).

[3] Classic Telephone, Inc., Motion to Dismiss Petition for Reconsideration (filed Dec. 22, 1998).

[4] Classic Telephone, Inc. Petition for Emergency Relief, Sanctions and Investigation, CCBPol 96-10, Memorandum Opinion and Order, 12 FCC Rcd 15619 (1997) (*Classic Enforcement Order*). In the *Classic Enforcement Order*, the Commission declined to grant the "Petition for Emergency Relief, Sanctions, and Investigation," filed by Classic seeking enforcement of the Commission's December 6, 1996 *Classic Preemption Order*, but stated that the Cities must act promptly on any future telephone

(continued...)

provide local telephone service in the Cities. Given Classic's decision, the *Classic Dismissal Order* also dismissed as moot the Cities' petition for reconsideration of the *Classic Enforcement Order*.[5] The Cities seek reconsideration of the *Classic Dismissal Order* based on their claims that the *Classic Dismissal Order* failed to address issues raised in the Cities' petition for reconsideration of the *Classic Enforcement Order* and the Cities' comments on Classic's motion to dismiss.[6]

2. We deny the Cities' petition for reconsideration of the *Classic Dismissal Order*. We find that the *Classic Dismissal Order* properly determined that the Cities' petition for reconsideration of the *Classic Enforcement Order* is rendered moot by Classic's decision not to provide local telephone service in the Cities. We also find that the Cities raise no issues in their comments on Classic's motion to dismiss or in their petition for reconsideration of the *Classic Dismissal Order* that were not previously declared moot in the *Classic Dismissal Order*. We therefore find no reason to disturb that decision.

3. Accordingly, pursuant to sections 4 and 253 of the Communications Act, 47 U.S.C. §§ 154, 253, and section 1.106(a)(1) of the Commission's rules, 47 C.F.R. § 1.106(a)(1), IT IS ORDERED that the Cities' petition for reconsideration of the *Classic Dismissal Order* IS DENIED.

(...continued)
franchise applications by Classic. Classic Telephone, Inc., Petition for Preemption, Declaratory Ruling and Injunctive Relief, Memorandum Opinion and Order, 11 FCC Rcd 13082 (1996) (*Classic Preemption Order*).

[5] *Classic Dismissal Order*, 14 FCC Rcd 960, para. 2.

[6] Classic Telephone, Inc., Motion to Dismiss Petition for Reconsideration (filed Dec. 22, 1998).

4. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
Magalie Roman Salas
Secretary

FEDERAL COMMUNICATIONS COMMISSION

Classic Telephone, Inc.

CCBPol 96-10; FCC 00-432

ORDER

Adopted: December 7, 2000
Released: December 12, 2000

By the Commission:

1. In this Order, we vacate the *Preemption Order*[1] and the *Order Denying Relief*[2] in this proceeding in light of our decision to terminate the underlying proceeding as moot.[3] In the *Preemption Order*, the Commission preempted decisions by the cities of Bogue and Hill City, Kansas (the Cities) denying the local telephone franchise applications filed by Classic Telephone, Inc. (Classic). In the *Order Denying Relief*, the Commission denied Classic's request that the Commission take action to enforce the *Preemption Order*. Both Classic and the Cities petitioned for reconsideration of the *Order Denying Relief*. Classic subsequently asked the Commission to dismiss its petition for reconsideration as moot, stating that it no longer

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[1] *Classic Telephone, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 13082 (1996) (*Preemption Order*).

[2] *Classic Telephone, Inc.*, Order, 12 FCC Rcd 15619 (1997) (*Order Denying Relief*).

[3] *Classic Telephone, Inc.*, Order on Reconsideration, 14 FCC Rcd 19974 (1999) (*Dismissal Order*), *aff'g Classic Telephone, Inc.*, Order, 14 FCC Rcd 960 (Com. Car. Bur. 1999) (*Bureau Dismissal Order*). In terminating the proceeding, the Bureau also dismissed the Cities' petition for reconsideration of the *Order Denying Relief* as moot. *Id.*

planned to provide local telephone service in Bogue or Hill City. The Common Carrier Bureau (Bureau) granted Classic's request, terminating this proceeding as moot, and the Commission subsequently affirmed the Bureau's decision.[4] The Cities have petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the *Preemption Order*, the *Order Denying Relief*, and the *Dismissal Order*.[5]

2. Consistent with the principles established in *United States v. Munsingwear*,[6] we vacate the *Preemption Order* and the *Order Denying Relief*. In *Munsingwear*, the Supreme Court held that when a case on appeal is dismissed as moot, the decision below is to be vacated to prevent an unreviewable decision from spawning any legal consequences for parties that could not obtain review. Vacating these two underlying orders will ensure that these decisions will not have legal consequences for the Cities.

3. Accordingly, IT IS ORDERED that the *Preemption Order* and the *Order Denying Relief* in this proceeding ARE hereby VACATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

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[4] *See supra* note 3.

[5] *City of Bogue v. FCC*, Nos. 96-1432 and 99-1521 (D.C. Cir. filed Nov. 22, 1996 and Dec. 13, 1999).

[6] 340 U.S. 36 (1950) (*Munsingwear*). The federal courts have applied the *Munsingwear* doctrine to rulings by administrative agencies on review in federal courts. *See, e.g., A. L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324 (1961); *American Family Life Assurance Co. v. FCC*, 129 F. 3d 625 (D.C. Cir. 1997).

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

City of Bogue, Kansas and City of Hill City, Kansas, Petitioners v. Federal Communications Commission and United States of America, Respondents, National Cable Television Association, Inc., et al., Intervenors

No. 96-1432 Consolidated with 99-1521

Filed June 29, 2001

BEFORE: Edwards, Chief Judge, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges.

ORDER

Upon consideration of petitioners' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

For the Court:
Mark J. Langer, Clerk
By: Robert A. Bonner
Deputy Clerk

Circuit Judge Henderson did not participate in this matter.

Const. Art. I, § 8 cl. 3

Congress shall have power to *** regulate commerce with foreign nations, and among the several states, and with the Indian Tribes ***

Const. Art. III, § 2

The judicial power shall extend to call cases, in law and equity, arising under this Constitution, the laws of the United States ***

Const. Art. VI, cl. 2

This Constitution, and the laws of the United States which shall be made in pursuance thereof *** shall be the supreme law of the land; and the judges in every state shall be bound thereby, any Thing in the constitution or laws of any State to the contrary notwithstanding.

Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Eleventh Amendment

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Fourteenth Amendment § 5

*** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

5 U.S.C. § 702 Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action

within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. §706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall–*** (2) hold unlawful and set aside agency action, findings, and conclusions, found to be–*** (B) contrary to constitutional right, power, privilege, or immunity***

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 2343. Venue

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

28 U.S.C. § 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of--(1) the nature of the proceedings as to which review is sought; (2) the facts on which venue is based; (3) the grounds on which relief sought; and (4) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

47 U.S.C. § 253. Removal of barriers to entry.

(a) IN GENERAL.--No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any

entity to provide any interstate or intrastate telecommunications service.

(b) STATE REGULATORY AUTHORITY.--Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) STATE AND LOCAL GOVERNMENT AUTHORITY.--Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) PREEMPTION.--If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency. 47 U.S.C. § 253.

47 U.S.C. § 257. Market Entry Barriers Proceeding

(a) Elimination of Barriers.--Within 15 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this Act (other than this section), market entry barriers for entrepreneurs and other small businesses in the

provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services.

(b) National Policy.--In carrying out subsection (a), the Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.

(c) Periodic Review.--Every 3 years following the completion of the proceeding required by subsection (a), the Commission shall review and report to Congress on--(1) any regulations prescribed to eliminate barriers within its jurisdiction that are identified under subsection (a) and that can be prescribed consistent with the public interest, convenience, and necessity; and (2) the statutory barriers identified under subsection (a) that the Commission recommends be eliminated, consistent with the public interest, convenience, and necessity.

47 U.S.C. § 402. Judicial review of Commission's orders and decisions

(a) Procedure. Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28. ***

(j) Finality of decision; review by Supreme Court. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of title 28, by the appellant, by the Commission, or by any interested party

intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

47 C.F.R. § 1.282 Final decision of the Commission.

(a) After opportunity has been afforded for the filing of proposed findings of fact and conclusions, exceptions, supporting statements, briefs, and for the holding of oral argument as provided in this subpart, the Commission will issue a final decision in each case in which an initial decision has not become final.

(b) The final decision shall contain:

(1) Findings of fact and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record; (2) Rulings on each relevant and material exception filed; the Commission will deny irrelevant exceptions, or those which are not of decisional significance, without a specific statement of reasons prescribed by paragraph (b)(1) of this section; and (3) The appropriate rule or order and the sanction, relief or denial thereof.

K.S.A. 12-2001

Granting of franchises; certain provisions declared void; purposes; conditions. (a) The governing body of any city may permit any person, firm or corporation to:

(1) Manufacture, sell and furnish artificial or natural gas light and heat; electric light, water, power or heat; or steam heat to the inhabitants; (2) build street railways, to be operated over and along or under the streets and public grounds of such city; (3) construct and operate telegraph and telephone lines; (4) lay pipes, conduits, cables and all appliances necessary for the construction, operation of gas and electric-light or steam-heat plants; (5) lay pipes, conduits, cables and all appliances

necessary for the construction and operation of electric railways or bus companies; (6) lay pipes for the operation of a water plant for the distribution or furnishing of water over, under and along the streets and alleys of such city; or (7) use the streets in the carrying on of any business which is not prohibited by law.

(b) If the governing body of a city permits any activity specified in subsection (a), the granting of permission to engage in the activity shall be subject to the following:

(1) All contracts granting or giving any such original franchise, right or privilege, or extending or renewing or amending any existing grant, right, privilege or franchise, to engage in such an activity shall be made by ordinance, and not otherwise.

(2) No contract, grant, right, privilege or franchise to engage in such an activity, now existing or hereafter granted, shall be extended for any longer period of time than 20 years from the date of such grant or extension.

(3) No person, firm or corporation shall be granted any exclusive franchise, right or privilege whatever.

(4) The governing body of any city, at all times during the existence of any contract, grant, privilege or franchise to engage in such an activity, shall have the right by ordinance to fix a reasonable schedule of maximum rates to be charged such city and the inhabitants thereof for gas, light and heat, electric light, power or heat, steam heat or water; the rates of fare on any street railway or bus company; the rates of any telephone company; or the rates charged any such city, or the inhabitants thereof, by any person, firm or corporation operating under any other franchise under this act. The governing body at no time shall fix a rate which prohibits such person, firm or corporation

from earning a reasonable rate upon the fair value of the property used and useful in such public service. In fixing and establishing such fair value, the value of such franchise, contract and privilege given and granted by the city to such person, firm or corporation shall not be taken into consideration in ascertaining the reasonableness of the rates to be charged to the inhabitants of such city.

(5) No such grant, right, privilege or franchise shall be made to any person, firm, corporation or association unless it provides for adequate compensation or consideration therefor to be paid to such city, and regardless of whether or not other or additional compensation is provided for such grantee shall pay annually such fixed charge as may be prescribed in the franchise ordinance. Such fixed charge may consist of a percentage of the gross receipts derived from the service permitted by the grant, right, privilege or franchise from consumers or recipients of such service located within the corporate boundaries of such city, and, in case of public utilities or common carriers situated and operated wholly or principally within such city, or principally operated for the benefit of such city or its people, from consumers or recipients located in territory immediately adjoining such city and not within the boundaries of any other incorporated city; and in such case such city shall make and report to the governing body all such gross receipts once each month, or at such other intervals as stipulated in the franchise ordinance and pay into the treasury the amount due such city at the time the report is made. The governing body shall also have access to and the right to examine, at all reasonable times, all books, receipts, files, records and documents of any such grantee necessary to verify the correctness of such statement and to correct the same, if found to be erroneous. If such statement of gross receipts is incorrect, then such payment shall be made upon such corrected statement.

On and after the effective date of the act, any provision for compensation or consideration, included in a franchise granted pursuant to this section which is established on the basis of compensation or consideration paid by the utility under another franchise, is hereby declared to be contrary to the public policy of this state and shall be void and unenforceable. Any such provision, included in a franchise granted pursuant to this section and in force on the effective date of this act which requires payments to the city by a utility to increase by virtue of the compensation or consideration required to be paid under a franchise granted by another city to the utility's predecessor in interest, is hereby declared to be contrary to the public policy of this state and shall be void and unenforceable.

(6) No such right, privilege or franchise shall be granted until the ordinance granting the same has been read in full at three regular meetings of the governing body. Immediately after the final passage, the ordinance shall be published in the official city paper once a week for two consecutive weeks. Such ordinance shall not take effect and be in force until after the expiration of 60 days from the date of its final passage. If, pending the passage of any such ordinance or during the time between its final passage and the expiration of 60 days before such ordinance takes effect, 20% of the qualified voters of such city voting for mayor, or in case no mayor is elected then the commissioner or council member receiving the highest number of votes, at the last preceding city election present a petition to the governing body asking that the franchise ordinance be submitted for adoption to popular vote, the mayor of the city shall issue a proclamation calling a special election for that purpose. The proclamation calling such special election shall specifically state that such election is called for the adoption of the ordinance granting such franchise, and the ordinance shall be set out in full in the proclamation. The proclamation shall be published once each week for two

consecutive weeks in the official city newspaper, and the last publication shall not be less than 30 days before the day upon which the special election is held. If, at the special election, the majority of votes cast shall be for the ordinance and the making of the grant, the ordinance shall thereupon become effective. If a majority of the votes cast at the special election are against the ordinance and the making of the grant, the ordinance shall not confer any rights, powers or privileges of any kind whatsoever upon the applicants therefor and shall be void.

All expense of publishing any ordinance adopted pursuant to this section shall be paid by the proposed grantee. If a sufficient petition is filed and an election is called for the adoption of any such ordinance, the applicants for the grant, right, privilege or franchise, upon receipt by the applicants of written notice that such petition has been filed and found sufficient and stating the amount necessary for the purpose, shall immediately deposit with the city treasurer in cash an amount sufficient to cover the entire expense of such election. The mayor shall not issue a proclamation calling such election until such money is deposited with the treasurer. Upon such failure to so deposit such money the ordinance shall be void.

(7) All contracts, grants, rights, privileges or franchises for the use of the streets and alleys of such city, not herein mentioned, shall be governed by all the provisions of this act, and all amendments, extensions or enlargements of any contract, right, privilege or franchise previously granted to any person, firm or corporation for the use of the streets and alleys of such city shall be subject to all the conditions provided for in this act for the making of original grants and franchises. The provisions of this section shall not apply to railway companies for the purpose of reaching and affording railway connections and switch privileges to the owners or users of any industrial plants, or for the purpose of reaching and affording railway

connections and switch privileges to any agency or institution of the state of Kansas.

Supreme Court Rule 13-- Review on Certiorari: Time for Petitioning 1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review. ***

3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for re-hearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment.

D.C. Cir. Rule 35(a) Time Within Which to File. A petition for rehearing or a petition for rehearing en banc, in a case in which neither the United States nor an agency or officer thereof is a party, must be filed within 30 days after entry of judgment or other form of decision. In all cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing or rehearing en banc is 45 days after entry of judgment or other form of decision.

The time for filing a petition for rehearing or rehearing en banc will not be extended except for good cause shown.